MISSISSIPPI LAW JOURNAL

ARBITRATION AND AWARD

Wesley A. Sturges

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Robert Gerwig

CLOSING AGREEMENTS AND COMPROMISES UNDER THE NEW POLICY OF THE INTERNAL REVENUE BOARD

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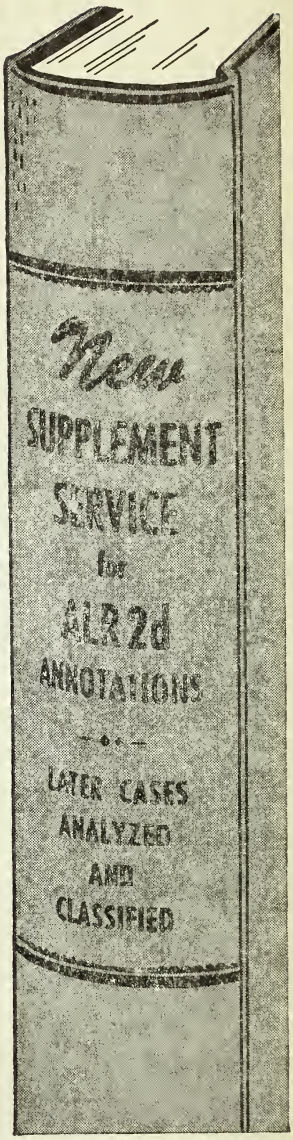

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ARBITRATION AND AWARD†

*Wesley A. Sturges**

It is a pleasure to me and indeed an honor to me and to the institution which I represent to be invited here today to participate in your program. I thank you for the invitation. It also gives me an opportunity to pay my respects to Bob Farley and his colleagues at the University of Misisippi Law School. I beg to say that we at Yale rate Mississippi very highly and hold our colleagues up there in high esteem. We feel a closeness to them and have genuine respect for them. Hoping that my words do not sound in flattery, I pay my respects to that law school as one of the best in the country.

Turning to the subject of arbitration: I approach it as a method of liquidating controversies which may arise between parties—controversies of a civil nature—and treat the process as one that is available to lawyers for use in a given case if they shall determine its desirability in the case. It presents a choice of remedy in lieu of ordinary civil procedure of civil actions and requires the lawyer to select the method to be used in a given case. I am not here today to try to "sell" arbitration to the lawyers of Mississippi, but rather to examine the position of the process, particularly in this state, and to make some suggestions as to possible improvements of the present law of the state, particularly of the Mississippi statute on arbitration, in order that it may be as efficient as is reasonably practicable.

The arbitration that I am talking about is predicated upon an agreement of the parties to arbitrate; I thereby distinguish it from some terminology that has crept into our law under the name "compulsory arbitration." Briefly stated, the term "compulsory arbitration" is most generally associated with the functioning of some sort of administrative board under regulatory powers of national or local government. Generally that agency is charged with powers and duties relating to the administration of various aspects of labor relations of employers and labor unions. It is not a term identifying the arbitral process under voluntary agreements of parties to arbitrate.

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†An address delivered at the Eighth Annual Mississippi Law Institute, December 11, 1953, in Jackson, Mississippi.

*Dean of Yale Law School.

I am talking about arbitration which is based upon an agreement of the parties to arbitrate; it is not compelled; it is not required and is not supervised or scrutinized by an administrative board or commission acting under the power of the state.

In Mississippi, as in almost all other states, there are two general systems of arbitrating. One is called the "common law system" and the other is called the "statutory system." You have an arbitration statute in the Mississippi Code.[1] It outlines a statutory procedure for arbitrating and that statute in its last section expressly provides that that statutory system does not displace arbitrating at common law. Parties may choose between them. Both the statutory and common law of this state are predicated upon and are dependent upon an agreement by the parties to arbitrate.

Which is the better choice in this state? It is somewhat difficult to determine whether parties are better advised to invoke the arbitration statute or to forego the arbitration statute and proceed at common law. I will indicate why a little later.

But in granting the existence of the two methods of arbitration—one pursuant to the statute, the other at common law—what are some of the frailties that attend the process? I will examine them first as at common law and then under the Mississippi arbitration statute.

In this state, as in a considerable number of other states, it has been held at common law that agreements to arbitrate are revocable. Their revocability speaks itself in at least two particulars. *Jones v. Harris*[2] is a leading case in this field. For the first particular: Parties enter into an agreement to arbitrate. Later, before an award, one party changes his mind and does not wish to go forward with the arbitration. At common law and under the decisions of this state, he may, notwithstanding his agreement to arbitrate, institute civil proceedings on the cause that was to be arbitrated. This is frequently called revocability by action. The agreement to arbitrate is held to be revocable in the particular that it cannot be pleaded in abatement or in bar of that action. The agreement to arbitrate is said to be revocable in this respect because it is against public policy; it is against public policy because it would oust the courts of their jurisdiction.

A second particular of common law is known as revocability by notice. Two parties go to arbitration under their agreement; they cooperate in the appointment of their arbitrator; the arbitrator fixes the time and place of hearing. The parties participate in the hearing and present their respective sides of the case. Along the end of the hearing

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[1]MISS. CODE §§ 279-297 (1942).
[2]59 Miss. 214 (1881).

one party (I will now call him the recalcitrant party) concludes that the arbitrator is leaning seriously in favor of the other side. He can end the whole proceeding in the name of revocability by notice. He may send up a little piece of paper to the arbitrator that says, "My dear sir; your authority is hereby revoked. Signed, R. P." And that is the end of the arbitration and of the authority of the arbitrator. In other words, the party may fish with hope for a favorable award in a common law arbitration, but when he comes to doubt that the arbitrator will go in his favor, he may, if he wishes to do so, revoke by the notice. Giving such notice is an effective revocation, even though the parties may have stipulated in their arbitration agreement that there shall be no revocation, and even though there is an express consideration for the stipulation against revocability. In addition to these frailties of the agreement inherent in common law revocability by action and by notice, there is the further frailty that the agreement to arbitrate is not enforceable in any positive manner. So far as courts with equity powers have passed upon the question in this country, they have declared that they will not specifically enforce an agreement to arbitrate. For example: They will not grant an injunction that the recalcitrant party go forward with the arbitration. Equity seems to have accepted the rules of common law revocability—and being revocable at law, equity would not embarrass itself with a futile attempt at enforcement.

And as no general injunction order will issue that the recalcitrant party proceed under his arbitration agreement, so will a court of equity refuse to undertake the appointment of an arbitrator even to fill a vacancy occurring in an arbitral board once duly established. Such is the common law stature of arbitration agreements and their frailties as I understand obtain in Mississippi and many of the states. They are revocable in the two particulars which I have cited; and no remedies of specific performance will be granted—no injunctional order to proceed, no auxiliary order will be granted, such as filling a vacancy in the arbitral board which the parties may have agreed upon, but which the recalcitrant party will not cooperate in accomplishing.

I should now indicate that I have been referring to two types of arbitration agreements that are in current usage. One type of arbitration agreement is commonly known as the future disputes provision. Such provisions are in quite wide use in commercial contracts generally, and, of course, in collective bargaining agreements. As distinguished from the arbitration provision to arbitrate disputes which may arise in the future there are agreements to arbitrate which are entered into only after the dispute has arisen between the parties. These agreements are generally called agreements of submission. As I read the Mississippi cases, the rules of common law revocability and non-enforceability are applicable to both classes of arbitration agreements.

What's the situation today in Mississippi under your arbitration statute? As I have indicated, your statute says in so many words that common law arbitrations are still good; that the enactment of the statutory system is not to be deemed to displace the privilege of parties to proceed at common law outside the statute.

The statute, as doubtless almost all of you know, is considerably skeletonized. In the first place, it deals only with agreements of submission of existing disputes. It does not purport to cover any type of agreement to arbitrate a future dispute. So, a provision to arbitrate future disputes in a general commercial contract or in a collective bargaining agreement in this state is subject to common law revocability and non-enforcement. The statute is not burdensome in its requirements to qualify an agreement of submission under the statute. No more is required than that the agreement be in writing. Whether it must be signed by both persons is an unanswered question. An agreement of submission of an existing dispute in writing and signed by the parties can safely be said to qualify under the statute. Grant that we execute such an agreement, then where are we? Are we better off so far as the remedies of the statute are concerned than we would be at common law? The Mississippi statute is quite distinct from companion statutes of contemporary origin in other states in that it contains no provision that a qualified submission agreement is irrevocable. It is a common provision of the older arbitration statutes, like that of Mississippi, to declare generally that a qualifying submission agreement duly executed by the parties shall be irrevocable—meaning apparently, no revocation by notice, and no revocation by action.

Secondly, there are no provisions in the Mississippi statute that improve the party's position as compared with that at common law in seeking to obtain specific performance in any respect. In other words, even when the parties have entered into a qualifying submission agreement under the statute, probably it is revocable as at common law and non-enforceable as at common law. There is no provision in the Mississippi statute for any such positive affirmative enforcement of a qualifying submission agreement. So, as compared to the common law situation on revocability and on non-enforceability of arbitration agreements the Mississippi statute does not seem to offer much, if anything, to the efficiency of the arbitral process.

There are some advantages, however, that I will emphasize. In the first place, there is provision in the statute that in an arbitration held under a qualifying submission agreement, the arbitrators may compel the attendance of witnesses and the production of other evidence. That is definitely an advantage over the common law situation. In the absence of some special statute, common law arbitrators have no

authority for compulsory attendance of witnesses, nor for the production of documents or other evidence. In that particular the Mississippi statute gives an advantage provided the agreement is fully carried out and the arbitral board is ready to proceed.

A second advantage lies in the procedures that are provided in the statute for the enforcement and for the vacation or modification and correction of the statutory award. They are likely to be superior to the corresponding common law remedies. As I read the Mississippi statute the successful party to a statutory award may have the award confirmed and judgment or decree entered thereon by motion on short notice of five days. The same is provided for proceedings to vacate or to correct the face of a document of award. In case of the common law award, the party who is successful and who would enforce it generally must institute a plenary action or a plenary suit in equity for that purpose. He bases his cause of action upon the agreement for arbitration and upon the fact of the award and the due appointment of the arbitrator under the submission. Depending upon the state of the dockets of the courts, and absence of the availability of motions for summary judgment in such proceedings, probably it should be concluded that the five day notice motion to confirm a statutory award or the five day motion to vacate, modify or correct would prove more expeditious than the corresponding common law action or suit in equity in case of the common law award. In other words, in so far as the motion practice for confirmation of the award and entry of judgment or decree thereon, for vacation and for modification or correction of a statutory award is more expeditious than the corresponding plenary action or suit in the case of the common law award, so is there advantage in having a statutory award.

So far as the prestige and position of the award is concerned, so far as the conclusiveness and finality of the award is concerned, and so far as the scope of judicial review in proceedings on an award is concerned, the stature of the statutory and common law awards seem quite similar. In short, the statutory causes to vacate, modify or correct a statutory award appear to be virtually a codification of common law rules.

Accordingly, the advantages in this statute seem to be chiefly: (1) arbitrators' power for compulsory attendance of witnesses and (2) possibility, if not probability, that the motion practice under the statute with respect to statutory award for enforcement, vacation or modification and correction is more expeditious than the corresponding common law plenary action or suit to enforce or to vacate the common law award. Incidentally, the Mississippi statute expressly provides with respect to the statutory award that the party may choose to use the common law remedy rather than the statutory motion. He may use the

motion proceeding or he may bring plenary suit. The Supreme Court has held that the plenary suit is a proper alternative remedy for the enforcement of a good statutory award. I draw the inference that the converse would be true and that a plenary suit rather than a motion to vacate could be effectively instituted against a statutory award. On the whole, therefore, I submit that the arbitral process in this state, whether in the labor field or in the commercial field, and under the statute as well as at common law, is subject to the common law frailties which I have previously cited.

Now, with your permission, I will call your attention to the more modern arbitration statutes of other jurisdictions. I am going back to the New York arbitration law which was originally enacted in 1920, and is now in effect in New York as Article 84 of the New York Civil Practice Act. The general pattern of that law has since been followed in the arbitration statutes of most of the important commercial and industrial states and by the Congress in the United States Arbitration Act. Arbitration statutes of this pattern are now in effect in such states as California, Connecticut, New Jersey, your sister state of Louisiana, and in the United States Act. How does this more recent arbitration legislation compare with the older arbitration statutes like that of Mississippi? How do they differ?

In the first place the newer acts embrace provisions to arbitrate future disputes as well as agreements of submission of existing controversies. Generally, either type of agreement will qualify under the statute if it is in writing except that it is expressly provided that the agreement of submission also must be signed by the parties.

In the second place these statutes address themselves to the common law rules of revocability and non-enforceability and provide for the irrevocability and enforceability of arbitration agreements that qualify under the statute. The typical introductory section is to this effect: a provision to arbitrate a future dispute or an agreement of submission of an existing dispute qualifying under the statute shall be "valid, irrevocable and enforceable." Succeeding sections implement this declared purpose of making those qualifying agreements to arbitrate irrevocable and enforceable by providing specific remedies. The first of these remedies overcomes common law revocability by action. To this end it is provided that if the parties shall have entered into an arbitration agreement of either type, but one party changes his mind and starts an action or suit in court in defiance of their agreement, the aggrieved party may apply to the court in which the proceeding is started for a stay of trial of that action. The recalcitrant party may duly challenge the making of the alleged arbitration or its coverage of the cause sued upon. In such case the court shall hear the matter,

unless a jury trial is claimed. Upon finding that the arbitration agreement was duly entered into and that it covers the dispute sued upon, stay of the trial is ordered. So there is an end to common law revocability by action. Now, for the more positive enforcement remedies. The arbitration statutes of this more recent pattern provide for specific enforcement in two particulars: (1) If a party becomes recalcitrant in the performance of his agreement to arbitrate, the aggrieved party may by motion, on short notice, apply for summary injunctional order to proceed with arbitration according to the agreement. Trial to the court or by jury may be had if the recalcitrant party puts in issue the making of the agreement, his default thereunder, or its coverage of the particular controversy sought to be arbitrated. The general order to proceed nullifies a great part of common law revocability and non-enforceability. (2) There is one further remedy in these statutes that addresses itself particularly to the matter of the arbitral board. Parties have agreed to arbitrate, but they have said nothing about whether they will have one or more arbitrators nor how they are to be appointed. The chap who now wishes not to arbitrate may well refuse to participate in setting up an arbitral board. The aggrieved party may go to court by motion on short notice to have the court appoint an arbitrator. The arbitrator appointed by the court is further given all the powers that an arbitrator would have had had he been appointed by cooperation and participation of the two parties. Like motion is available if the arbitral board breaks down in the course of the proceedings *i.e.* a vacancy occurs by reason of death or the withdrawal of an arbitrator. These newer arbitration statutes also generally provide that when the arbitral board is duly appointed, it may, after giving notice of the time and place of hearing, proceed ex parte, in the absence of a party if his absence is without good cause. To stay away from the hearing out of recalcitrance will not defeat the arbitration. Indeed, the arbitrator is virtually directed by the statute to hear such evidence as is brought before him by the participating party with respect to the issue at hand and to render his award on that evidence. It is no objection to the confirmation of such an award that it was rendered after an ex parte arbitration if the absent party stayed out without sufficient cause.

Other provisions of these statutes of this new pattern are similar to the Mississippi statute. In other words, the provisions of the Mississippi statute for the procurement of witnesses and evidence by compulsory process is common to the newer group of statutes to which I have referred. The motion provisions of the Mississippi statute for the enforcement of a good statutory award and for seeking the vacation or modification and correction of the award are common to these newer statutes. Again, the provisions of the Mississippi statute listing the causes to vacate an award, limited as they are, are almost identical with the cor-

responding remedies in the newer statutes Accordingly, I come to the conclusion that the Mississippi statute, so far as it goes, in its coverage, is one of the better of the older ones. Its shortcomings, judged by the pattern of the more recent statutes to which I have referred, lie in (1) its failure to embrace provisions to arbitrate future disputes as well as agreements of submission of existing disputes and (2) its failure to provide summary remedy to overcome common law revocability and non-enforceability.

On the other hand, in view of the worthy quality of the Mississippi statute, so far as it goes, it could be readily amended by adding those provisions of the newer statutes which make for irrevocability and enforceability of qualifying arbitration agreements.

I wish to discuss one or two further matters involving the newer arbitration statutes and their consideration, if the Mississippi statute should be amended. The arbitration statutes which follow the pattern of the New York law of 1920 are considerably divergent as to their coverage or arbitration provisions in collective bargaining agreements. In some of these statutes it is expressly provided that the act shall not apply to provisions for arbitration in collective contracts between unions and employers or between associations of employees and associations of employers. Other statutes of this general pattern are not so precise but purport to exclude arbitration provisions in personal service contracts. The United States Arbitration Act excepts arbitration provisions in certain "contracts of employment." Query whether or not a collective bargaining agreement, in writing, carrying out an arbitration provision, would qualify under these less precise exclusions. In other words, there has been some confusion and uncertainty among the legislatures as to whether or not the new type of statute, making arbitration provisions irrevocable and specifically enforceable in the particulars that I have indicated should embrace provisions to arbitrate future disputes in collective bargaining agreements. In Connecticut and in New York there are no such exceptions; and, indeed, the New York statute, as recently amended, expressly provides that the statute shall apply to arbitration provisions in collective agreements between employers and unions. The Supreme Court of Connecticut so held without such express provision. This diversity in these statutes seems to reflect some misapprehension about the operation of these statutes of the newer pattern. If the parties enter into an arbitration provision or agreement of submission of an existing dispute which qualifies under the statute, the statute accords remedies to overcome common law revocability and non-enforceability of the agreement. If the parties voluntarily enter into an arbitration agreement which qualifies under the statute and do not see fit to stipulate in their agreement that the statute shall not apply, the statute

and its remedies will apply. On the other hand, the parties may stipulate that the statute shall not apply, leaving their agreement subject to common law revocability and non-enforceability. The parties may choose so to stipulate or not to stipulate. In short, what the new statutes do is this: with respect to agreements which qualify under the statute, parties may, if they wish, have common law revocability and non-enforceability. They may have those rules by so stipulating even though their arbitration agreement complies with the statute. On the other hand, if the parties do not wish to have common law revocability and non-enforceability, they may invoke the statute by accomplishing an arbitration agreement which conforms to its requirements. The parties may choose. They have no such choice at common law. They cannot effectively stipulate against revocability nor for specific enforcement. In either case the arbitral process is wholly dependent upon a voluntary agreement by the parties to arbitrate; these newer arbitration statutes, no more than the older ones, compel any parties to enter upon any agreement to arbitrate.

WORKMEN'S COMPENSATION—EXPRESSING THE CLAIMANTS' VIEWS†

*Samuel B. Horovitz**

Judicial Interpretations

Introduction

When I received the invitation to come to Jackson, Mississippi, I began wondering why you wanted a Boston lawyer to talk about Workmen's Compensation in the light of the Mississippi statute. When I came here and saw the program, I had an idea that today you wanted me to talk about what I think of the Justices of your Supreme Court, what I think of their decisions and what I think about your Workmen's Compensation Commission and its decisions. I thought that perhaps tomorrow you would like me to talk frankly about what I think of your Workmen's Compensation Act and your legislature, and what changes should be made in your Act. I felt that it would not be becoming to one of you who practices here to discuss so delicate a subject; so you brought a Boston lawyer to do it.

Hardly had I arrived here when one of the insurance men—on the other side of the docket from my plaintiff practice—came to me and said, "Now Mr. Horovitz, will you please be sure to tell them who you are and on which side of the docket you appear?" Therefore I'll begin by telling you that I am a bad man! If you don't believe it, I have three authorities here to prove it.

The first one in an article in *Readers' Digest*;[1] this article is a condensed copy from a journal published by the United States Chamber of Commerce, many of whose members are connected with insurance companies. This article said that another fellow[2] and I founded an association of plaintiffs' lawyers known as NACCA, the National Association of Claimants' Compensation Attorneys. I plead guilty. The article continued to say that we then founded a school in which we teach the lawyers how to get verdicts of $100,000, $200,000 and $300,000. I wish it were true; I would like to see such adequate verdicts some day. Then the article goes on to lament that as a result of the work of NACCA the "poor" insurance companies are going to lose $100,000,000 a year. I am solely a Workmen's Compensation lawyer. That was my first indictment. National insurance journals now repeatedly "blame" NACCA

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†From two addresses delivered at the Eighth Annual Law Institute in Jackson, Mississippi, on December 11 and 12, 1953.

*Horovitz, Petkun and Rothschild, Boston, Massachusetts; Founder and Executive Editor of the N.A.C.C.A. Law Journal.

[1]Velie, *And Then—Sudden Ruin*, Readers' Digest, September 1952, p. 79.

[2]Melvin M. Belli, Attorney at Law, San Francisco, California.

lawyers for increasing verdicts and Horovitz specifically for increasing Workmen's Compensation benefits.[3] Now let me lead up to the second indictment against me.

I read all of your Mississippi Workmen's Compensation cases and I couldn't help noticing one special thing among these cases. Mr. Justice Hall, whom I have never met, in the case of *Mutual Implement & Hardware Insurance Co. v. Pittman*[4] thinks I'm all right. He says, in effect, we've got to decide whether Mississippi is going to follow the old and narrow path or the broad and liberal path. Then he chooses the liberal path and quotes Horovitz on *Current Trends in Workmen's Compensation*.[5]

A Mr. Justice Roberds, whom I have never met, but who I know is a very able and outstanding Justice, and a very honorable man, is suspicious of me. He states:

> "Without intending the slightest criticism, I think it proper to observe that the main business of Mr. Horovitz, as commonly reputed, is the representation of claimants in compensation cases. It is noted, too, that the quotations are mainly expressions of what he thinks is, or ought to be, the law in these cases. He says in one place '. . . my view on the matter is quite determined.' At least, these considerations should have some bearing upon the weight to be given his comments."[6]

So I'm a stubborn fellow! If you read my text, however, you'll find that I am quoting an English judge, who is the stubborn fellow whose view on the matter is quite determined. Still, again I'm a little bit suspect.

There's a third reason why I am suspect. I'll make a confession. Thirty-two years ago I started my legal career working for a large insurance company; but I plead in defense that I have spent the last thirty-one years making amends.

Now I would like to discuss Workmen's Compensation. As I am sure many of you know, every year in our country nine million people suffer injuries, some of which are in fields covered by Workmen's Compensation and some of which are in other fields. Today I'm going to talk about the two million who are injured in the shops and factories and whose injuries are covered by our Workmen's Compensation Acts. I am going to talk also about the amount of money which employers pay out for their insurance to pay for these injuries.

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[3]11 N.A.C.C.A. L.J. 298, 304, 311, 312 (1953).

[4]59 So.2d 547 (Miss. 1952).

[5]Horovitz, *Current Trends in Basic Principles of Workmen's Compensation*, 12 L.Soc.J. 465, 611, 682 (1947); 10 N.A.C.C.A. L.J. 80 (1952).

[6]Mutual Implement & Hardware Insurance Co. v. Pittman, 59 So.2d 547, 560 (Miss. 1952); 10 N.A.C.C.A. L.J. 81 (1952).

I wonder if any of you realize that Workmen's Compensation insurance puts into the coffers of the insurance companies more money than any other casualty insurance, even including automobile insurance. Every year these insurance companies that I'm supposed to "rob" of $100,000,000 a year collect in premiums not a hundred million, not five hundred million, not a billion, but a billion, two hundred and fifty million a year![7] On their own admission they are only going to pay out seven hundred million; over five hundred million will remain with them for overhead and profit.

Today I am going to discuss the history and judicial decisions in Workmen's Compensation. In order to do that, I am going to take you back one hundred years and bring you up to the Mississippi Act. Before I start, I would like for four male law students and one female law student to come forward. I need you as part of my lecture this first hour.

Historical Background

About a hundred years ago, we didn't have factories and we didn't have the mechanized age; we were an agricultural society. The laws that the judges laid down then were well suited to an agricultural country. Then the factory system began; the railroads began; industries began to multiply. The old requirement that there must be negligence or fault that had worked in the agricultural age was not adequate for the industrial age.

In one of the early cases a fellow had been seriously injured in an accident due to the fault of a fellow employee. The injured party said, "There's fault here; there's negligence; and I want to collect for the injury." The court denied recovery and said in effect, "Oh, no. A fellow servant is to blame. It must be the fault of the boss personally. The fellow servant completely insulates the employer."[8]

In another case the court denied recovery on the grounds of assumption of risk.[9] A thirteen year old boy had worked in a factory for a week. He received no warning or instructions with regard to a revolving saw near the passageway. One day this revolving saw was left unguarded while in motion. In going down to the office to get his pay the boy caught his coat in the adjacent bench and the saw took off his left hand at the wrist. The presiding judge ordered a verdict for the defendant. The Supreme Judicial Court affirmed the ruling and stated:

"The plaintiff assumed the obvious risks of the service into

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[7]Somers, *Workmen's Compensation—Unfulfilled Promise,* 7 IND. & LAB. REL. REV. 38 (1953); 12 N.A.C.C.A. L.J. 317, 325, 367 (1953).

[8]HOROVITZ, WORKMEN'S COMPENSATION 2 n.3 (1944); for a discussion of the employer's defenses see MALONE, LOUISIANA WORKMEN'S COMPENSATION 6 (1951).

[9]*Ibid.*

which he entered. The defendant owed him no duty to change the arrangement of the saw, bench and passageway or its manner of doing business. . . . The plaintiff took the place as he found it with all of its obvious risks. . . . No duty rested on the defendant to point them out."[10]

There was a third defense that knocked out practically all other employees' cases. The courts ruled that if the employee contributed to his injury—even though the boss himself was ninety-five percent to blame and the employee was only five percent to blame—the worker couldn't collect. No wonder then that before 1900, with these three defenses—the "unholy trinity"—in our law, with accidents multiplying, eighty percent of the workmen, even with jury trial, lost their cases.[11] With the growth of labor unions and the increase in accidents, we looked for some other scheme by which to compensate workers.

In 1884 Bismarck put through a compensation act in Germany. Germany had become more mechanized by that time, and Bismarck had done away with the civil law that required negligence. He said, in effect, "From now on, if you are injured while working in a factory, you'll get two-thirds of your pay. You'll get it for the full time that you're incapacitated; you'll get enough to live, not in comfort or ease, but enough to live under the standard of living we have. If you die, your widow will be compensated during her entire unmarried widowhood. For certain permanent and total injuries you will get full pay for life. You'll get all the medical attention you need. We won't talk of negligence any more."

Thirteen years later the English passed the Act of 1897. In 1903 the knowledge "percolated over" to Massachusetts and someone filed a bill to adopt a Workmen's Compensation Act. Under this Act the boss would hereafter, through Workmen's Compensation Insurance, have to take care of his injured workmen. In 1911 the Act was finally passed and in 1949 Mississippi became the forty-eighth state to adopt a Workmen's Compensation Act. We also have such Acts in every territory[12] as well as in Europe, Japan, and even for a time in Russia.[13] The framers of these Acts said that the Workmen's Compensation would give two things: (1) An injured worker would receive enough money to live on, plus payment of medical bills and (2) Litigation would practically cease.

Exclusivity versus Additional Tort Remedy

In addition to the two promises that we made to the workers, we

[10]Scanlan v. Page Box Co., 205 Mass. 12, 90 N.E. 1146 (1910).
[11]Horovitz, *op. cit. supra* note 8, at 3 n.5.
[12]*Id.* at 7.
[13]Armstrong, *Workmen's Compensation* in 15 Encyc. Soc. Sci. 488 (1935); Small, Workmen's Compensation Law of Indiana 4 (1950).

also said that we were going to take away the common law rights. This is a thing that has been a great grievance. When compensation was given through legislation in England and Germany, the legislators said, in effect, "We're going to give everybody compensation, but if the employer is to blame, we're going to let the injured worker keep his common law suit." In England today you receive your compensation, and then if you can show the employer was to blame for the injury, you get a verdict and take away only half of the compensation paid because the employees in England contribute to compensation premiums. In England, therefore, the compensation is an additional remedy to the tort remedy.

In 1910 large elements of employers, insurance companies and even labor unions were against Workmen's Compensation as a remedy.[14] They further insisted that if we were going to have the Act, we had to make the Act the sole remedy and take away all the worker's common law rights. The Mississippi Act not only takes away the man's common law rights, but those of his wife and his family and nearly everybody else. By special words, it was made an exclusive Act. In return for the surrender of his common law rights the worker was promised that (1) he would receive decent subsistence benefits and (2) there would be no need for litigation.

Simple Act with Slot-Machine Justice

Today let us concentrate our attention on the second part of this promise. The worker was told that it would not be necessary to go to a lawyer for his compensation. You get hurt, you get your money, and that's all there is to it. By 1910 the average injured worker was sick and tired of lawyers. He didn't like the insurance lawyer because he had been trying the tort cases and beating eighty percent of the workers. The worker didn't like his own lawyer any better because he won so few cases that he had to charge substantial fees. One of the first things the workers wanted to do, then, was to get rid of the lawyers.

The second thing they wanted to do was to get rid of the judges. They blamed the judges for the narrow common law rules and the infamous trinity of defenses.[15] Since they wanted an Act so simple that they wouldn't need judges, they provided for industrial commissions consisting of from three to five men. These men were not necessarily lawyers or judges; they were men of "common sense." Many persons thought this requirement ipso facto excluded lawyers! These men were told, "Forget all the law you know; forget all the common law; forget

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[14]Horovitz, *op. cit. supra* note 8, at 7.
[15]*Id.* at 2.

everything. Just decide the case on common sense and it will be simple."[16]

Note that I have just appointed an Industrial Accident Board of five members. (The five students are seated up front.) Now I want you people to decide these questions by common sense, forgetting the law that you know. I'll show you how "simple" the Compensation Acts are!

Most of the compensation statutes in our country state that a man shall be compensated if he has "a personal injury by accident arising out of and in the course of his employment." They say that these words are simple. "Personal injury" means the worker got hurt; "by accident" means that he didn't do it deliberately; "arising out of" means due to the employee's work; "in the course of" means while he was working. "Of the employment" was included because it is grammatically necessary to finish the sentence.

After the passage of such Acts, the newspapers announced that the insurance adjuster would pay the injured worker without any advice from a lawyer. It was slot-machine justice. Put a quarter in the machine and out comes our favorite cigarette, every package the same. Slot-machine justice!

Personal Injury

Although the Acts were supposed to be so simple that the people didn't think we would need any judges, every case that I am going to cite was in the Supreme Court of some state or in a high court in England. In a California case a fellow driving a wagon was in an accident in which he broke his wooden leg. As fortune had it, he didn't injure the stump and he wasn't injured otherwise. He had read in the paper that he didn't have to go to a lawyer, so he went to the company and asked for either seventy-five dollars or a new wooden leg. The insurance adjuster asked, "Why do you want a wooden leg?" He replied, "I had a personal injury." "Personal injury," cried the adjuster. "You mean property damage!"

Now, my Industrial Accident Board (turning to the five students), I want you to solve this problem by the application of common sense. Those of you who think it was "personal injury," raise your right hands. Why do you think it was "personal injury?" Why do you think it was "property damage?" (Various answers in wide disagreement given by

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[16]Mr. Justice Minton spoke of a "common sense, every day, realistic view," in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). The late Mr. Justice Murphy, in Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 479 (1947) rightly labelled the allegedly simple provisions as "deceptively simple and litigiously prolific." Bear, *Workmen's Compensation and the Lawyer,* 51 COL. L. REV. 968 (1951) shows that "slot-machine justice, without litigation, without lawyers, without judges, without delays," is now a myth.

students and audience.) The Supreme Court of California decided that it was property damage.[17] In Colorado it was decided that a similar injury was property damage.[18] You'll find no place in this country where *by decision* it is a personal injury. California and other states have now provided that "personal injury" includes injuries to artificial "members" of the body.

The next case concerned a worker who fell down and broke his eye glasses in an industrial accident. Now, my Industrial Accident Board, is he entitled to new eye glasses? Why? (Disagreement among the students.) The Supreme Court of California said that glasses were not artificial members of the body; they were just an aid to the eyesight.[19] Nearly every Act now provides that you can collect for injuries to artificial limbs, if you injure the surrounding tissues and new appliances are needed as part of the healing process; but you cannot collect for eye glasses or false teeth where there is no injury to human surrounding tissues and no special enabling statute.

Take the case of a worker whose job was to help make fertilizer. In the old days fertilizer was made by throwing bags of bones in a machine which ground them up. Unfortunately, the machine was very low. The bag caught on a button and threw him into the bone-grinding machine, which ground him to death. Another workman who saw the accident fainted and for six months afterwards was neurotic. All the doctors testified that there was no question but that his illness was due to what he had seen. When he applied for compensation, the insurance adjuster said, "You didn't have any personal injury; all you did was see it." Was this a personal injury?

In an English case a workman went to the help of another workman who met with a fatal accident. From the excitement the former sustained a nervous shock which produced neurasthenia. Would that be a personal injury?

In a third case a lady was sitting near a machine. A bolt of lightning struck near her and she became so frightened that she actually had a cerebral hemorrhage and became paralyzed. Nothing touched her; fright induced the paralysis. Did she have a personal injury? In each of the last two cases the courts decided that there was a personal injury.[20]

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[17]Pacific Indemnity Co. v. Industrial Accident Board, 215 Cal. 461, 11 P.2d 1 (1932); see Note 82 A.L.R. 1170 (1932); 12 L. Soc. J. 480 (1947).

[18]London Guaranty & Accident Co. v. Industrial Commission, 80 Colo. 162, 249 P. 642 (1926) states that "a wooden leg is a man's property, not a part of his person, and no compensation can be awarded for its injury." *But see* 8 N.A.C.C.A. L.J. 254 (1951).

[19]California Casualty Indemnity Exch. v. Industrial Accident Commission, 13 Cal. 2d 529, 90 P.2d 289 (1939).

[20]Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947); Yates v. South Kirkby Collieries, Ltd., [1910] 2 K.B. 538 (C.A.); 12 N.A.C.C.A. L.J. 60 (1953).

The overwhelming weight of authority then is that personal injury means "damage to the human body," whether it is organic or functional.[21]

In Massachusetts a workman was employed to grasp tools in a particular fashion. After doing this for fifteen years he was left with a claw hand, known as Dupuytren's contracture. Even the insurance doctors said it was due to fifteen years' grasping. Was this a personal injury? Bear in mind that every injured workman in most of the states of this country has to prove not only a "personal injury," but that the injury was "by accident" and that it arose "in the course of" and "out of" the employment. The Supreme Judicial Court in this case unanimously and solemnly decided that it was not a personal injury;[22] they declared that it was merely non-compensable "wear and tear."[23] They decided that it wasn't even an industrial occupational disease under our Act, and our Act covers all such diseases. In Wisconsin and New York the courts would probably say that such hand-contraction was an occupational disease.[24]

During the war, there were a great number of cases where women and men were working fast, making thousands of finger or arm motions in the course of a day. Following this kind of motion, they developed "tennis elbow" at the end of two or three weeks or months. Was that "personal injury" or "wear and tear?" Our board decided that there was a difference between fifteen years and two or three weeks or even months. The Supreme Court finally said there was a difference, in a case where bad lighting affected eyesight over a period of months. That was still personal injury, but it wasn't long enough to constitute "wear and tear."[25] There was one case, however, in which excessive walking over thirteen months accelerated heart trouble and yet the court denied compensation.[26]

By Accident

We were told that the words "by accident" were simple; they were so simple that the House of Lords took months to decide a 1914 case. In this case the boys at an industrial school for unruly boys did not like their assistant school master. One day when he bent down to pick up something, two boys took a barrel stave and hit him. He fell down and broke both elbows. When he recovered, he sought compensation. The

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[21]Horovitz, *op. cit. supra* note 8, at 73.

[22]Reardon's Case, 275 Mass. 24, 175 N.E. 149 (1931).

[23]Horovitz, *op. cit. supra* note 5, at 486.

[24]Marathon Paper Mills v. Huntington, 203 Wis. 17, 233 N.W. 558 (1930) states that hernia from twenty years' lifting is "industrial disease," though usually hernia is compensable as injury; see note 23 *supra*.

[25]Slow damage to eyes by months of poor lighting is discussed in Pell v. New Bedford Gas & Edison Light Co., 325 Mass. 239, 90 N.E.2d 555 (1950); tennis elbow is discussed in Henry v. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

[26]Burns' Case, 266 Mass. 516, 165 N.E. 670 (1929).

adjuster agreed that he had had a "personal injury" but he denied that the school master had received the injury "by accident." The adjuster said, "I have a sworn statement from the boys that they *intended* to hit you!" The House of Lords finally decided that the injury was "by accident."[27] They concluded that you had to look at it from the point of view of the *victim;* from his point of view it was an accident. I'm glad to say that nearly every jurisdiction in this country follows that reasoning.[28]

In a recent "by accident" case Chief Justice Vanderbilt and the Supreme Court of New Jersey split four to four.[29] Assume that a man unloading freight cars picked up a hundred pounds of beef every day. He had done it everyday for five years. On one particular day, however, he was picking it up in the usual way and he felt a pain in his back. The doctors, including the insurance doctors, diagnosed the injury as a ruptured disc, due to the lifting. The worker was an honest fellow and he said that he didn't slip, he didn't twist, he didn't do anything that he hadn't done for five years. He was doing his usual work in the usual position and sustained a broken disc. Was this "by accident?"

Suppose that he had a bad heart and didn't know it; his heart gave way. Was that an "accident?" The courts now rule about two to one that this was "by accident." The *result* is by accident.[30] Where the *cause* is unexpected the courts universally find the "accident." Some states say that a heart attack is different from a back injury, but most writers believe this is a distinction without a difference.[31]

I will give you one more illustration of the fallacious idea that this Act is so simple that you don't need a lawyer. The employer says to his workers, "There is an epidemic of flu going around, and if you want me to vaccinate you, I'll do so. It's optional." He vaccinates a workman, but some germ causes the workman to become sick and disabled. Was that "by accident?" Some courts, believe it or not, distinguished as to whether the employer *required* the vaccination or made it *voluntary*.[32] In my opinion, the *result* was unexpected and therefore the injury was "by accident" in both cases.

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[27]In Trim Joint District School v. Kelly, [1914] A.C. 667 there was a conspiracy to assault the teacher; the teacher died as a result of the blows and their lordships agreed that "accident" must be "construed in its popular and ordinary sense." A majority decided in favor of looking at it from the workman's standpoint. WILLIS, WORKMEN'S COMPENSATION 8 (37th ed. 1945).

[28]HOROVITZ, *op. cit. supra* note 5, at 497.

[29]Neylon v. Ford Motor Co., 10 N.J. 325, 91 A.2d 569 (1952) states that back strain resulting from unloading freight car in regular manner is orthopedic and presumptively traumatic. 11 N.A.C.C.A. L.J. 76 (1953).

[30]HOROVITZ, *op cit. supra* note 5, at 500 n.129.

[31]12 N.A.C.C.A. L.J. 66 (1953).

[32]HOROVITZ, *op. cit. supra* note 5, at 505 n.146.

Arising Out Of

There was an early case in which a minister sold shirts on Saturday. When going to a customer's house, he slipped and broke his leg. Did it arise out of his work? Our court refused compensation because it was a combination of an act of God and an accident which could have happened to anybody. It "is common to the neighborhood," and therefore did not arise out of his employment.[33] We subsequently amended our Workmen's Compensation statutes and inserted a special provision for street risks.[34] There are still a few states which say that street risks do not arise out of employment.[35]

We come now to a group of cases that have caused a lot of trouble—"acts of God." Suppose a lady in England ran a bake shop. She had an employee who was afraid of lightning. On a rainy day she said to the worker, "You must take this bread to Mrs. Smith." He replied that he was afraid of lightning, but she answered that he had to take the bread or lose his job. As he was engaged in making the delivery a bolt of lightning killed him. When the widow attempted to collect compensation from the adjuster, the adjuster agreed that her husband had suffered a personal injury by accident, but he denied that it "arose out of his employment." He said that it was an act of God! Would it have made any difference if instead of being hit by lightning, he had suffered frost-bite while delivering the bread? The House of Lords in the frost-bite case and the Irish court in a lightning case said that it did not arise out of employment,[36] but that it was a common risk facing anybody that went into that area on that day. Their lordships felt that you had to show an *increased* risk. They ignored the fact that the worker wouldn't have been exposed to the severity of the weather but for his job.

In a similar English case a bricklayer was struck by lightning while he was on a scaffold about twenty feet high. The widow's lawyer had expert testimony to prove that one is more apt to be struck by lightning if he is above the ground. The court decided in his favor and said that there was an increased risk.[37]

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[33]Donahue's Case, 226 Mass. 595, 116 N.E. 226 (1917); HOROVITZ, *op. cit. supra* note 8, at 95.

[34]See note 33 *supra;* Higgin's Case, 284 Mass. 345, 187 N.E. 592 (1933).

[35]HOROVITZ, *op. cit. supra* note 5, at 514.

[36]Warner v. Couchman, [1911] 1 K.B. 351. In Kelly v. Kerry County Council, [1908] 42 Ir. L.R. 23 a workman was killed by lightning while he was working on a road. The court held that the injury did not arise out of the employment. Yet, in 1929, when a traveller was struck by a falling tree while making his rounds on a motorcycle, it was held that the accident arose out of the employment; it brought him to a spot which had a quality of danger. Lawrence v. Matthews, Ltd., [1929] 1 K.B. 1.

[37]Andrew v. Failsworth Industrial Society, [1904] 2 K.B. 32; HOROVITZ *op. cit. supra* note 8, at 99.

Until 1940, believe it or not, that was the law in Massachusetts. You couldn't win your case unless you showed an *increased* risk. If you wanted to win the case of a man who froze his fingers off, you would have to get him down near the water front where it was ten degrees colder. If he was overcome by a sun stroke, you would have to get him down in a ditch where it was ten degrees hotter. Incidentally, until 1940 the majority of the states held that an act of God was a defense if there was direct action of the elements upon the employee uninfluenced by his employment. In other words, if he was killed directly by lightning or overcome by sun stroke, the act of God was a defense. One man had fingers of both hands frozen by the direct action of unusually cold weather. Doctors amputated parts of both hands. He was in the public square, shoveling snow. The courts said that there was no increased risk and that the injury was due to an act of God. As a matter of fact the man had to work early in the morning before the vehicles came; it was colder at that time, and there was an increased risk.[38]

In another Massachusetts case a third year Harvard Medical School student was substituting for a doctor. He became soaking wet one day while visiting children with colds. He was standing underneath an electrict light changing into dry clothes when a clap of lightning came down and hit him. He lived but he was paralyzed. Even though there was no expert testimony that he was more likely to be hit by lightning while standing under an electric wire, the Board found in his favor. When the case went to the Supreme Judicial Court, that body took judicial knowledge of the antics of lightning.[39] Instead of reversing their stand that you have to have increased risk, nearly every court today will find that increased risk even without expert testimony.[40] Still, the case is won on the theory that there was in fact an increased risk. A few courageous, sensible courts adopt the "position and locality" theory—the work placed the employee in the path of the elements and no increased risk need be shown.[41]

Then *Caswell's Case*[42] changed the law in Massachusetts. In that case there was a hurricane. A workman happened to be in a big brick shoe factory, and he just kept working while the hurricane raged outside. The building collapsed; the ceiling and wall bricks came down on him

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[38]Robinson's Case, 292 Mass. 543, 198 N.E. 760 (1935). *But see* Shute's Case, 290 Mass. 393, 195 N.E. 354 (1935) and Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).

[39]Bauver's Case, 314 Mass. 4, 49 N.E.2d 118 (1943).

[40]Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P.2d 844 (1931). The court took judicial notice that old dilapidated houses are "much more liable to be struck by lightning." A more recent lightning case, McKiney v. Reynolds & Manley Lumber Co., 54 S.E.2d. 471 (Ga. App. 1949), is discussed in 4 N.A.C.C.A. L.J. 91 (1949).

[41]McKiney v. Reynolds & Manley Lumber Co., *supra* note 40; Gargiulo v. Gargiulo, 97 A.2d. 593 (N.J. 1953); 3 N.A.C.C.A. L.J. 37 (1949); 9 N.A.C.C.A. L.J. 51 (1952).

[42]Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).

and broke both hips. There wasn't an increased risk; in fact, there was decreased risk because this was nearly the last building to give way. Since the court had twice refused to reverse its stand and hold that increased risk was unnecessary, as a last resort I argued that in every one of the cases in the English courts and the other courts that denied compensation for an act of God or the elements, the act of God acted directly on the victim. Lightning hit directly; hands froze directly. In this case, however, he wasn't picked up by the hurricane and taken out of the window and deposited violently on the ground. The hurricane hit the boss's bricks; the boss's bricks collapsed; the boss's bricks fell on the workman. I argued, in effect, that the injury was due to the joint acts of God and employer. The court declared that under those circumstances the employer was responsible. Shortly thereafter many other state courts followed this ruling.[43] The ruling is now sound law in the majority of jurisdictions when an instrumentality of the employment combines with an act of God to produce the injury. God forbid that some courts go back on this doctrine; but just give them the slightest way out and they'll sometimes change.

The whole problem is so simple; just common sense can decide it. Your own court recently had the cases of horseplay and assaults. Assume that two men are waiting in line to get their pay; one tickles the neck of the other who gets so frightened that he falls down and hits the radiator. He fractures his skull and dies. He was an innocent victim of horse play. Is his widow entitled to compensation?

Many years ago, they used power hoses in various factories. Men used the hoses to clean off steel, and sometimes the employers allowed them to use the hoses to clean off each others' clothes. Men in those days were no different from those today; they were mischievous. Not intending to hurt anyone, they would insert those power hoses in a man's rectum or in a man's ear. In the rectum, it would kill him; in the ear, it would deafen him. "Horseplay," cried the insurers. All of our courts until 1920 said that men weren't hired to play; men weren't hired to kill each other in horseplay. Men were hired to work; horseplay is horrible and is non-compensable.[44] How can we hold the insurance companies for the horseplay of men? What do you think? Do horseplay injuries "arise out of" the employment?

It took a most able judge, Mr. Justice Cardozo, then sitting on the highest court of New York, to say in effect that, "We know as a fact that if you congregate large groups of men together, they are going to play.

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[43]Goodyear Aircraft Corp. v. Industrial Commission, 62 Ariz. 398, 158 P.2d 511 (1945); 3 N.A.C.C.A. L.J. 46 (1949).

[44]"Inexcusable and revolting horseplay" was not compensated in Federal Rubber Manufacturing Co. v. Havolic, 162 Wis. 341, 156 N.W. 143 (1916). Numerous additional cases are cited in 41 ILL. L. REV. 315 (1946).

What is the difference if they slip on the floor or play with each other? Each is a risk of the environment; and although I have no case in this country or in England to support me, I say that horseplay arises out of the employment. It is a risk of the environment."[45] Court after court followed this line,[46] and I'm glad to say that your court, not being bound by precedent, recently held that the innocent victim of horseplay had a right to compensation.[47] New Hampshire awarded compensation following a horseplay injury even to one who participated actively therein.[48]

Suppose that the man who engineered the skylarking then got the worst of it. Should that make any difference? We say that "fault" has nothing to do with Compensation Acts. When you talk about who started the fight, then you're talking about who is to blame. If it arises "out of" for the victim, then it arises "out of" for the aggressor, when he becomes the victim.

So far as fault is concerned, if two men are fighting over the work, what do you do with the case? One man tries to take a pick axe which a second man claims to own. The second man protests vigorously, and the first then hits him over the head with the axe and fractures his skull. In 1918 our courts said that that didn't arise out of employment since he wasn't hired to split his fellow employee's head.[49] I'm glad to say that the overwhelming weight of authority in the United States is that if the employees are fighting *over the work* or any *incident* of the work, as distinguished from a purely personal quarrel, then it arises out of the employment.[50] Your court is one of the leaders, I'm glad to say, in extending the benefits to the victims of assault and victims of horseplay.[51]

Now I will discuss my final theme on "arising out of." Assume that a man who worked in a factory went to the factory toilet and that he sat down and the toilet seat broke and his hip was broken. When a similar case came before the Supreme Judicial Court of Massachusetts, the lawyer for the insurance company argued that the man was hired to work on the machine and not to go to the toilet. Did that "arise out of" his employment? The courts uniformly allow recovery. They say that a man is covered not only when he is doing the very work that he has been hired to perform but also while doing anything reasonably in-

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[45]Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711 (1920); 41 ILL. L. REV. 319 (1946).

[46]1 LARSON, WORKMEN'S COMPENSATION LAW §§ 23.00, 23.65 (1952); 41 ILL. L. REV. 311, 315 (1946); 3 N.A.C.C.A. L.J. 55 (1949); 11 N.A.C.C.A. L.J. 79 (1953).

[47]Miles & Sons v. Myatt, 61 So.2d 390 (Miss. 1952); 11 N.A.C.C.A. L.J. 79 (1953).

[48]Maltais v. Equitable Life Assurance Society, 93 N.H. 237, 40 A.2d 837 (1944) declares that slight aggression is no defense.

[49]Jacquemm v. Turner & Seymour Mfg. Co., 92 Conn. 382, 103 A. 115 (1915); 41 ILL. L. REV. 326 (1946).

[50]41 ILL. L. REV. 325 (1946); 4 N.A.C.C.A. L.J. 37 (1949).

[51]Mutual Implement & Hardware Insurance Co. v. Pittman, 59 So.2d 547 (Miss. 1952); 10 N.A.C.C.A. L.J. 80 (1952).

cidental thereto. Taking a drink of water, getting fresh air, smoking if permitted, going to the toilet, are all reasonable incidents of the employment.[52] If employees are injured doing anything reasonably incidental, they are protected just as much as if they were hurt on the main job.

In the Course of

We now come to the words "in the course of." Older legal minds said there can't be any argument about that phrase—it means "while working" or "during work." In a very early case in Massachusetts a lady by the name of Hallett punched her time clock at noon. On the way back from lunch, but before actually resuming work, her heel caught on the top step of the door leading into the store where she worked. She tripped and fell down and was killed. The insurance company investigator had a signed statement that she punched the time clock at noon and had not yet resumed her work or even reached her place in the store. The injury was not "while working." Now, would that be in the course of her employment?[53] Why?

A fellow by the name of Latter was a very punctual employee. His work began at eight, but at a quarter of eight he was always inside the building. On one day the elevator operator slammed the door accidentally on Latter's hand and took off two fingers. He worked on the fifth floor; this happened on the first floor fifteen minutes before his working day started.[54] Was this "in the course of" the employment?

Another man by the name of Smith didn't like to go out for lunch. When the lunch hour came, he ate the lunch that he had brought from home. The employer had provided a room with drinking water and seats; the employees could sit there from twelve o'clock until one. Smith sat down on one of the seats, the seat gave way, and he broke his hip. Was this "in the course of?"

In one more case a poor fellow was hurrying to work. He had to be at work at eight o'clock; it was two minutes until eight. There was ice on the sidewalk and he slipped within two feet of the door. If he had only gotten his foot in the door, it would have been all right; but he slipped two feet from the door on the public sidewalk. Was he "in the course of" his work?

All but two courts in this country now hold that you're in the course

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[52]For recreational incidents as incidents of employment see University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953); 25 Miss. L.J. 175 (1954);for other cases see Moore's Case, 110 N.E.2d 764 (Mass. 1953); 3 N.A.C.C.A. L.J. 60 (1949); 12 N.A.C.C.A. L.J. 77 (1953).

[53]Hallett's Case, 232 Mass. 49, 121 N.E. 503 (1919).

[54]Latter's Case, 238 Mass. 326, 130 N.E. 637 (1921) (Compensable though on premises one half hour early); Murphy v. Miettinen, 317 Mass. 633, 59 N.E.2d 252 (1945); Horovitz, *op. cit, supra* note 5, at 672 n.526.

of the work once you get on the employer's premises, even if it's before work or after work, so long as it is within a reasonable period. Ten or fifteen minutes early or late is ordinarily reasonable.[55] Noon hour injuries on the premises are regarded as "in the course of." Our courts start the protection the moment the employee is on the employer's premises, including private premises even if the employer doesn't own it, if the employer has a right to use it. So an alleyway[56] would be in the protection. Public sidewalk injuries are not protected in the great majority of the states. In some states, however, if you are reasonably close, that is still "in the course of" the employment.[57] Many states hold that if in order to get to your employer's premises you have to pass over *adjacent private premises,* you are in the protection of the Act.[58]

The United States Supreme Court in *Bountiful Brick Company v. Giles*[59] upheld an award extending the protection to adjacent private premises. In that case the board had before them the claim of a widow whose aged, deaf husband was killed by a train while he was en route to work. The man worked in a brick kiln and was on adjacent private railroad property fifteen minutes early about fifty feet away from his workshop. The board found that he was still "in the course of" when struck by the train. The Supreme Court of the United States said that the answer is up to the state courts. If they want to extend the words "in the course of" for a reasonable period of time, and to cover a reasonable space, it saw nothing in the federal or state constitution to prevent it. If the court is liberal and wants to protect the employee in going to and from work, you can cover public sidewalks for a reasonable distance from the workshop and you can certainly cover private premises.

In another case the employer of a cook who worked in a big hotel told the cook that he didn't have to live on the premises; but he offered the cook a room in the hotel. After midnight the cook had finished work and had gone to bed. There was a fire and the cook assisted in saving ten people in the building, but in doing so he was horribly burned. It was two hours after his work had ended. Was that "in the course of" his employment? Most of the courts try to seize upon a doctrine known as "subject to call." If the person employed can be called at two o'clock in the morning, he is "subject to call." If a person is subject

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55*Ibid.*

56Mannering's Case, 290 Mass. 517, 195 N.E. 757 (1935) (cleaning woman using private alleyway customarily used to reach street).

57Freire v. Maston Navigation Co., 19 Cal.2d 8, 118 P.2d 809 (1941) (paved bulkhead adjoining employer's premises site of accident fifteen minutes before work started); Park Utah Consolidated Mines Co. v. Industrial Commission, 103 Utah 64, 133 P.2d 314 (1943) (icy slope on roadway in front of premises).

58Horovitz, *op. cit. supra* note 8, at 160.

59276 U.S. 154 (1928).

to call, even though he has never been called at night, the courts say that he is "in the course of" twenty-four hours a day. Suppose, however, that a court had an honest man who said that he finished his work at midnight and was never subject to call. One court aptly said, "There is continuity of employment,"[60] and "subject to call" now has a famous twin sister. Both situations are now "in the course of." In short, when the employer provides a sleeping place, there is continuity of employment and it is "in the course of."

Of the Employment

How simple are the words "of the employment?" I told you that I always thought those words were put into the Act to end the sentence, but I hadn't seen or tried *Greene's Case*.[61] A fellow by the name of Greene didn't get along with his wife. He was a contractor and one day his wife told the police that if he ever moved the car after taking a drink, to catch him. He moved the car, the police caught him, and he was arrested for driving under the influence. He discovered that his wife was to blame for his arrest and became stubborn. The judge gave him his option of a hundred dollar fine or a month in jail. He chose imprisonment. They put him in the county jail and the jail officials said, "Mr. Greene, you're just the man we want. Will you take charge of converting the ladies' toilets into men's toilets and making certain other changes?" Since he was to be there for a month, he agreed. Unfortunately he fell into a pool of lye and was horribly burned. When he was released he came to my office and said, "I had a personal injury which arose out of and in the course of my employment."

The Massachusetts statute said that if you work for a *private* employer, you had to be under a contract of hire; but if you worked for a *public* employer, all you had to do was be employed. No contract of hire was mentioned. The Supreme Judicial Court said that "of the employment" meant *voluntary* employment. Every state that has had that prisoner problem has so ruled.[62] Your convict is generally out of luck, except by some recent statutory changes in a few states.[63] Now let's see what that means. Many of the states like Massachusetts have insurance on "employees" of the local jail. Suppose a man in jail has his arm cut off while he is making plates. Long after he is freed he is still disabled. Is it fair to read into the Act the words "voluntary employment?"

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[60]Giliotti v. Hoffman Catering Co., 246 N.Y. 279, 158 N.E. 621 (1927); HOROVITZ, *op. cit. supra* note 5, at 766.

[61]Greene's Case, 280 Mass. 506, 182 N.E. 857 (1932) (reinforced by statute).

[62]Lawson v. Travelers Insurance Co., 37 Ga. App. 85, 139 S.E. 96 (1927); HOROVITZ, *op. cit. supra* note 5, at 781.

[63]By statute North Carolina allows recovery. Public Laws 1929, as amended 1914, c. 120, § 14; MD. CODE § 47 (1939).

Suppose a policeman said to a citizen walking along the street, "You come with me. I impress you into the service. You are now a policeman. Go with me into this house." Now these police-impressed people are often injured. Are they employees? It certainly isn't voluntary employment, and yet every court that has had that type of case, with few exceptions, said that it comes under the Compensation Act.[64]

Multiplication of Litigation

I think that today I have demonstrated to you that this so-called simplicity, this so-called slot-machine justice, without lawyers and without judges, is a mere dream. You cannot decide cases merely on common sense. That is one of the reasons that we have one hundred thousand disputed cases[65] every year in the United States on Workmen's Compensation.

The Money Benefits

Introduction

The subject that I'm going to discuss this morning is entirely different; no Industrial Accident Board is needed. My subject concerns "dollars and nonsense." When you talk about dollars, you hit people in the pocketbook; and when you hit people in the pocketbook, they don't like it. I believe that it is my duty to tell you how I feel about this subject; the subject is important to all of us. It is important to the injured worker and his dependents whose financial future often depends on those weekly payments and medical payments. It is also important to the lawyers because it would be bad if Workmen's Compensation were abolished and lawyers no longer had Workmen's Compensation cases to help keep their offices going. I'm sure that some of the plaintiff lawyers, too, would feel bad if Workmen's Compensation were abolished. Not that either the insurance lawyers or the plaintiff lawyers are in the profession solely to make fees. We're in the profession to help improve the administration of justice.

Furthermore, I am sure that the courts wouldn't like it if we abolished the courts from the field of Workmen's Compensation. Not that it means dollars to them; courts can go along with other types of cases, but it's a field in which the judges have been of tremendous help to injured workers. I believe that the courts in the forty-eight states in

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[64]Babington v. Yellow Taxi Corporation, 250 N.Y. 14, 164 N.E. 726 (1928) (cabby impressed by policeman and cabby's employer held liable); Mitchell v. Industrial Commission, 57 Ohio App. 319, 13 N.E.2d 736 (1936) (claimant was deputized employee of county). Note that the second case regarded the worker as becoming a new employee of the county and the first case regarded the claimant as remaining in employment of the cab company; yet in neither case was there a voluntary contract of employment.

[65]Somers, *supra* note 7, at 39 states that "It is now estimated that over 100,000 compensation cases are litigated a year." 10 N.A.C.C.A. L.J. 29 (1952).

this country have done an admirable job in the field of Workmen's Compensation. When I spoke yesterday I was talking about a subject in which there is a fair amount of agreement. Both sides will admit that no matter how the courts decide the cases, they do it in accordance with their consciences; they are above all these petty things I am going to discuss today. Today I come to the subject of legislation and what is happening in dollars and cents to Workmen's Compensation.

Promise of Subsistence Payments

I told you yesterday that when we enacted the Compensation Act we promised the injured workers two things: (1) as little litigation as possible and (2) subsistence payments adequate enough to get along on a low standard of living. We saw how we failed in the first promise; now let's consider the second. We promised not to make injured workers objects of charity. We promised that the industry that destroyed them would give them, through insurance or otherwise, enough to get along in decency and take care of their families during the period of enforced idleness. We promised to give them medical care or payments; and if death ensued, we promised to take care of the widow and children and other dependents without making them wards of public or private charity. The promise in this country was one of subsistence, not of mere pittances. In England and on the continent compensation payments unfortunately amounted to mere pittances, far below subsistence.

However, abroad they said to the injured worker, "Compensation is only one of your remedies. You still have your common law rights and you can still sue a negligent employer and get full damages." Europeans kept their word; they still allow full tort damages for full wage loss, humiliation, and other items of damages, where the employer is negligent. They simply deduct therefrom the Workmen's Compensation paid out.[66]

In the United States we said, "No, we're not going to give them mere pittances like they do in Europe; we're going to give them real subsistence payments. In return, however, we are going to take away all of their common law rights and thus give the employers something for their extra generosity." Today every state takes away every common law right of every injured worker.[67] Your Mississippi Act states in the strongest language that it is *exclusive* of all other rights. If the injury is under the Workmen's Compensation Act, the worker must accept those payments and cannot sue the employer for negligence. In exchange, we promised the injured workers subsistence. We said that we had to start easy but that as time went on we would get the payments up to sub-

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[66]12 N.A.C.C.A. L.J. 368 (1953); 10 N.A.C.C.A. L.J. 32 (1952). Saskatchewan allows tort suit for negligence, deducting workmen's compensation, for auto injury cases. 10 N.A.C.C.A. L.J. 49 (1952).

[67]2 LARSON, WORKMEN'S COMPENSATION LAW § 65.00 (1952); 287 ANNALS 54 (1953).

sistence levels.[68] We promised to give the employees what was right.

In the forty years since we began talking about subsistence payments, I think you will agree that we have given the workers *less in purchasing power* than we gave them in 1913. The United States Department of Labor says that the minimum cost of living for five people is eighty dollars weekly.[69] Even if you cut this to fifty dollars, that is the absolute minimum on which a man with a wife and three children can live.

Do we in fact give a man enough to live on this minimum standard? In Mississippi the *maximum* any human being can get under your Act is twenty-five dollars a week. Your Act reads well. If you read it quickly, it says two-thirds of his wages. There is a tricky little clause, however, that says two-thirds of the wages, but *not exceeding* twenty-five dollars a week.

What do you say to a man who loses both legs or both eyes or has a broken back or goes insane as a result of an injury and has to stay in an institution the rest of his life? You say, "I'm sorry for your injuries, but you can't sue the employer even if he is negligent. We are going to give you twenty-five dollars a week to support yourself and your wife and three children." So you starve him week by week, and then to add to the insult, when he reaches eight thousand six hundred dollars or four hundred and fifty weeks, *whichever is lower*, you say, "Let private or public charity take care of you; we're through with you. Industry has destroyed you, but charity is going to take care of you."

Mississippi is no worse than half the other states in the nation. That is no justification; the fact that others insult the workers even worse than you do is no excuse. You can't blame the judges for this; the law is made by the legislators. Why has the legislature given only half a decent living standard?

Lobbies

I feel that the inadequate benefit structure is due to the forces which come before the legislature. Let us ask ourselves for whose benefit was Workmen's Compensation enacted. It was put on the books solely and exclusively for the benefit of *injured persons* and their dependents. It wasn't put on the books for the benefit of insurance companies; it wasn't put on the books for the benefit of lawyers; it wasn't put on the books to help the employer get a low rate or a high rate. I believe that you must keep in mind that the prime motive is to help injured workers.

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[68]Katz and Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, 4 LAB. L.J. 169 (1953); 12 N.A.C.C.A. L.J. 337 (1953).

[69]Katz and Wirpel, *supra* note 68, at 175.

Yet who had the money to bring pressure on the legislature, pressure which resulted in this twenty-five dollars a week? I believe in lobbies. If you don't have lobbies, how can the legislature know both sides of proposed legislation? I think they are a healthy thing, if they are *equally balanced.* There is a strong insurance lobby in every state. I don't blame the companies. If I were collecting premiums amounting to one billion, two hundred and fifty million dollars[70] a year, I would want to hold on to as much of it as I could. They do a good job of holding on to it.[71]

I will show you later on that the insurance companies manage to keep at least forty-eight cents on the dollar—this is on their own figures—and that the workers, the doctors, the nurses and everybody else gets only fifty-two cents on the dollar.[72] Insurers have a selfish interest; they are in business for profit and their powerful lobby is heard. The most powerful lobby in the country in Workmen's Compensation is the combination of insurance companies and employers. There is also a labor union lobby which is strong in some other states. Neither is this labor union lobby free from fault. I will say, however, that unions are the injured workers' most powerful friends. Where you have a strong union lobby, the compensation benefits are fairly decent, compared with yours.

I wish that there were such a thing as a judges' lobby, because then we would probably get a decent benefit rate. A judge would be impartial, since he had no financial interest; his pay is no more whether the plantiff wins or the defendant wins. We don't have, however, what Dean Roscoe Pound[73] likes to call a "ministry of justice," a department that advises the legislature on an impartial basis. So, when you have a state where there aren't equal lobbies—and there aren't equal lobbies in Mississippi—your benefits stay low.

Adequate Weekly Compensation Payments

I'll show you what has been done in other states. In Arizona there are some strong men representing injured workmen, who insisted that their two-thirds means two-thirds, or rather sixty-five percent. They said if a man earns a hundred dollars a week, let him get his sixty-five dollars, because the insurance company charges the employer premiums on the *whole wage.* For years Arizona gave a straight sixty-five percent.

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[70]Somers, *Industrial Safety & Health in the United States,* 6 IND. & LAB. REL. REV. 482 (1953) states that "Annual costs to employers of workmen's compensation premiums and equivalent costs of self-insurance are now estimated to be over $1,250,000,000."

[71]In 1952 the Liberty Mutual Insurance Company collected workmen's compensation premiums of $103,154,384 with incurred losses of only $50,442,283; over fifty percent was retained for overhead and profit. Boston Herald, Apr. 9, 1953, p. 19; 11 N.A.C.C.A. L.J. 18 (1953); 10 N.A.C.C.A. L.J. 42 (1952).

[72]*Ibid.;* 12 N.A.C.C.A. L.J. 317 (1953).

[73]12 N.A.C.C.A. L.J. 19 (1953).

Then an unfortunate thing happened. A California firm moved actors into Arizona; a young lady was badly injured. She said, "I make ten thousand dollars a week; I want sixty-five hundred in compensation." They paid her, but the legislature subsequently set the maximum at one hundred and fifty dollars a week. This is certainly fair; any injured worker should be able to live on that amount. Furthermore, the premiums in Arizona aren't appreciably higher than the premiums in most of the large states.

Alaska, too, gives sixty-five percent with a seventy-five dollar weekly maximum. The rates in Alaska aren't much higher than they are in Mississippi, either.

For federal employees the United States Government gives two-thirds of the wages up to a hundred and twenty-one dollars and fifteen cents a week. Thus, we have the three jurisdictions[74] that are giving decent subsistence benefits. This can be done if you remove the pressure groups who keep on insisting that if you give subsistence, you are going to drive industry out of the state. That is what I call absolute nonsense.

Impartial parties have made studies of the cost of Workmen's Compensation as compared to the cost of running the entire business. The average compensation rate in the United States is about one percent. In Georgia it is seven-tenths of one percent; in Arizona, the highest state, it is two and one-half percent.[75] If you give everything that I'm going to ask you to give—compensation for life, for permanent and total incapacity, subsistence benefits up to fifty or sixty dollars a week to widows for life—the difference will be between one percent and one and one-half percent at most. It is sheer nonsense to say that industry will be driven out if you go from one percent to one and one-half percent.

That argument was made in Massachusetts when the legislature was asked to allow weekly compensation to widows for life.[76] The opponents of the legislation declared that industry would be driven to South Carolina. In South Carolina the insurance companies wanted a ten percent increase in premiums. The same insurance-employer lobby said that if the legislature raised their twenty-five dollar weekly compensation rate to thirty dollars, industry would be driven north. Yet this nonsensical cry continues to deceive some of our legislators.

There might be some argument in the fact that if labor costs go up, industry will be driven out because labor costs are fifty percent of the entire costs. It is ridiculous, however, to say that an increase from one to one and one-half percent will drive industry out.

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[74]Alaska, Arizona, and the Federal Government.
[75]Somers, *supra* note 7, at 39.
[76]Mass. Gen. Laws 1932, c. 152 § 31, as amended by, Stat. 1948, c. 666.

Dependency Payments

Thus far we have discussed only weekly payments for the living and the injured worker. What about the widows? Under Workmen's Compensation Acts human life is the cheapest thing in the United States. I challenge insurance companies to deny it.

What do you give a widow in this state if her husband is killed? I don't care if she has a dozen children, what is the most that you give her? You say you take thirty-five percent of the wages and then you add a certain amount for each child. It sounds good. But you forget that cruel limitation which the insurance companies and employers have obtained from the legislatures—"but not exceeding twenty-five dollars a week." What widow and three children can live on twenty-five dollars a week, with the husband gone? After she receives eighty-six hundred dollars, the benefit payments are stopped and the family goes on charity. Then the widow is told, "Your husband is dead and you can't sue the employer. We have taken away all of your common law rights." Is that fair?

If all the states were limiting widows to a stated amount, you might say that you were no worse than the others, but eleven states now give widows compensation for life. Furthermore, all the dire predictions made by the opposing lobbies when Massachusetts became the eleventh state to give such compensation have turned out to be nonsense.

We have proof of what the cost is to insurers in providing payments to widows for life. Professor Stefan A. Riesenfeld of Minnesota made an impartial study published in the NACCA Law Journal.[77] The study compares the cost of compensation for life as compared to the cost when a limitation of eighty-six hundred dollars is placed on the payments. Can you guess what it costs in New York, for example, to adequately compensate widows for life? New York is the highest paying state in the country; for a long time they have paid widows for life. A widow there can get as high as thirty-five dollars a week for the rest of her life.[78] The study showed that the average cost is eighty-eight hundred and twenty-eight dollars.[79] What was the reason for this low cost? The young widows remarry and their compensation stops, except for a small remarriage bonus; and the old widows die and it stops.

In the thirty-seven states that have provisions similar to that of Mississippi the average cost is not quite four thousand dollars.[80] The

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[77]Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 8 N.A.C.C.A. L.J. 21 (1951).

[78]Dept. of Labor Bull. 125 (1950) as amended.

[79]See note 77 *supra*.

[80]$3972. See note 77 *supra*.

Mississippi statute says eighty-five hundred dollars, but I venture to say that the average cost in Mississippi is not over forty-two hundred dollars.

Recently a Georgia newspaper lamented the fact that payments for a death had increased from thirty-seven hundred dollars to forty-two hundred dollars.[81] The supreme sacrifice in industry at a cost of only forty-two hundred dollars!

A provision which often brings about pitiful results is the provision that dependency compensation for a child ceases when the child reaches eighteen years of age. No state has had the courage to help a widow who has a bright child; higher education is impossible for these children. Do we call this a good Compensation Act?

Medical Payments

In regard to medical payments the Mississippi provisions are excellent. Thirty-one of the forty-eight states give full medical payments.[82] I'm glad that your state makes the insurance companies pay all of the medical expenses, no matter how much is necessary. Seventeen states still set a maximum limitation on the amount of medical payments that a person may receive.[83] Why should charity have to take over the derelicts of industry after a certain amount of medical payments have been received?

There is, however, one disadvantageous feature of the medical payments provision in Mississippi. You don't give the injured man the *choice* of his doctor; the insurance company provides the doctor. To me this is an unfair provision. About half the states now let the worker choose his own doctor.[84] Of course, sometimes it is advisable to continue to let the board pass on the reasonableness of the charge. When the employee is allowed to choose the doctor, he has someone on his side if a question of disability arises later. I don't think it is right to put everything in the hands of the insurance companies.

Comparison with Non-Compensation Cases

Let us compare compensation awards with awards to railroad workers, seamen, and others in non-compensation cases. If a man loses a leg or an arm and is not under the Compensation Act, he is just now beginning to get adequate compensation in the United States.

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[81]Atlanta Journal, Mar. 23, 1952, complains that in Georgia in 1949-50 the average cost of a death claim rose from $3720 to $4270, and permanent total disability costs rose from $5960 to $6850. It seems shameful that a life is worth so little in a world where "prize bulls sell for $200,000; race horses, violins and famous pictures have been known to bring as high as $500,000." 10 N.A.C.C.A. L.J. 264 (1952).

[82]See note 78 *supra*.

[83]*Ibid.*

[84]Horovitz, *op. cit. supra* note 8, at 293.

In a tort case, in a railroad case, in an admiralty case, what are juries giving, if there is negligence? You know that currently it isn't so hard to prove negligence under the Federal Employer's Liability Act[85] and the Jones Act,[86] where the courts say negligence is ordinarily a jury question. Men are getting fifty thousand dollars and upwards for one leg. In the NACCA Law Journal you will find reports of verdicts as high as a hundred thousand dollars for high wage earners who lose a leg. The compensation for loss of two legs can run from a hundred and fifty thousand to two hundred and twenty-five thousand dollars.[87]

Assume that two men are working together. One is under the railroad law and the other is under the Compensation Act. Each loses a leg; and what do you award in your state? What does the injured worker get in Workmen's Compensation payments in the average state? Insurers can "buy" one leg for less than four thousand dollars in the average state under the Compensation Act. Isn't that a horrible situation? In a day when the dollar is worth very little, insurers can still "buy" two legs and two eyes and pay for insanity for life under Workmen's Compensation with eight thousand dollars! Why do you get so much at common law or under the railroad law? Because the jury figures the losses to include *full* wages, pain and suffering, humiliation and the like. What percentage of his wage does the average injured worker receive in compensation today? An impartial study made by Professor Somers of Haverford College indicates about twenty-two percent of his real wage loss.[88] The statutes say "not more than twenty-five dollars," and this cruel limitation plus "waiting periods" when nothing is paid, gives the average workman who has received a serious injury only twenty-two percent of his wage loss. But at common law you get a hundred percent of your wage plus compensation for pain, suffering, and disfigurement.

Disfigurement

Your compensation for disfigurement is shocking. You don't give any compensation unless the disfigurement is a facial or head disfigurement. Other states make allowances for any kind of disfigurement. Why shouldn't they? Why limit it to the head and why limit it to two thousand dollars?

Specific or Schedule Compensation

There is another terrible clause which is present in your statute as

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[85] 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-59 (1946).

[86] 38 STAT. 1185 (1915), as amended, 46 U.S.C. § 688 (1946).

[87] The current President of N.A.C.C.A., James A. Dooley, collected $212,000, including interests and costs, for a garage mechanic who lost both legs. Smith v. Illinois Central R.R. 99 N.E.2d 717 (Ill. App. 1951); 8 N.A.C.C.A. L.J. 231 (1951).

[88] Somers, *supra* note 7, at 35 states that the 1952 average for North Carolina was twenty-two and one-tenth percent; in 1940 it was twenty-six and four-tenths per cent.

well as in those of other states. Assume that a man loses a leg and can't get a job for years. You say to him, "We're going to give you a limited number of weekly payments, and no more. We have a schedule which determines the number of payments you will receive. We ignore the fact that nobody will hire you for years. That amount is all you'll get and no more. We are not going to look into the future."

Insurers sometimes say, "Compensation is to replace the wage loss." But you set an arbitrary amount and ignore the real wage loss. In Massachusetts, for example, we say, "Yes, a man is going to get a certain amount of specific or schedule compensation because he is never going to be the same. Specific compensation is merely a bonus *in addition* to weekly compensation. If you can't work for life, you'll get compensation for life." If he gets a job, his compensation stops; but if he can't get a job because of his loss of the arm or leg, he goes back on compensation. There is no limit. Our Supreme Court has recognized that one hand off can be a permanent and total disability.[89] Instead of getting two hundred weeks of five thousand dollars, men in Massachusetts can get twenty-five thousand dollars or more for the loss of an arm.[90]

Wisconsin has a schedule similar to that of Mississippi, but in that state the loss of an arm is worth over sixteen thousand dollars.[91] Is there something different between the arm of a Mississippian and a Wisconsinian? True, some states give even less for an arm, but that's no justification for injustice to your injured workers.

Smaller States Also Increasing Benefits

There are those who ask whether industry can stand such payments as I suggest. Eighteen states are now doing what I suggest for Mississippi—giving compensation for life.[92] Business in these states is better than in most of the other states. They do happen to be the big states, but there are some small states giving such compensation. Widows receive compensation for life in Arizona, District of Columbia, Hawaii, Nevada, North Dakota, Washington, and West Virginia. If they can do it, and their industry can stand it, why can't you? Of course, it can be done, if you can overcome the powerful employer-insurer lobbies. You must get a counter-lobby that is powerful enough to make its voice heard.

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[89]Gramolini's Case, 101 N.E.2d 750 (Mass. 1951); 9 N.A.C.C.A. L.J. 103 (1952); 10 N.A.C.C.A. L.J. 109 (1952).

[90]The author recently settled Murphy's Case, where a young man lost most of his arm, under the Workmen's Compensation Act, for a total payment of $25,025, not including medical payments made.

[91]See note 78 *supra*. In Mississippi compensation is $25 weekly for 200 weeks; in Wisconsin compensation is $32.50 weekly for 500 weeks.

[92]See note 78 *supra*.

Spreading the Compensation Costs

I want to discuss one other idea. I understand that among your big exports to other states are cotton, wood products, paper, turpentine and oil. Suppose that a man working on those products loses both arms and becomes a permanent disability. At the present time what happens? You stop paying him at eighty-six hundred dollars and then he goes on charity. The taxpayers take care of him. That product which is shipped to other states goes with a slightly lower price because of your local compensation rate. You saved your half of one percent, but local Mississippi charity takes over your cripples. If you do as I suggest, your compensation rate may go up from one percent to one and one-half percent. The employer will add that cost to the cost of the product which is being exported, and those of us in other states will pay that extra half a percent. The cost will not be placed entirely on your local people but will be spread throughout the nation.

England Ousts the Insurance Companies

In England there has been tremendous dissatisfaction over Workmen's Compensation. The employees objected and even some of the employers objected on account of the high insurance rates. The insurance companies admit that forty-five cents on the dollar remained with them for overhead and profit in Workmen's Compensation insurance, and over fifty-three percent of the premiums collected for automobile insurance for the year 1952.[93] They don't need forty-eight cents for overhead and profit.[94] Let's see what happened in England as a result of the dissatisfaction with the Compensation Act. The government, prodded by indignant workers, rose in arms and eliminated every insurance company from the field of Workmen's Compensation.[95] Everything has been put into a sort of state fund, a socialistic scheme.

In my opinion, the worker is worse off than ever before. He was dissatisfied, but he went from the proverbial frying pan into the fire. Today not a single independent lawyer in England makes a cent on Workmen's Compensation. The insurance lawyer is out, the plaintiff lawyer is out, and the judges are out. They now have an administrative bureau, whose rulings are final.

Conclusions

Ladies and gentlemen, I leave you with this final thought. Those of

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[93] 12 N.A.C.C.A. L.J. 318 (1953).

[94] HOROVITZ, *op. cit. supra* note 8, at 394. The state fund of Puerto Rico for 1951-52 used only 17.94 percent for both administrative and reserve. For administration alone the seven exclusive state funds in the United States operated on four to eleven percent.

[95] POTTER AND STANSFELD, NATIONAL INSURANCE (INDUSTRIAL INJURIES) 5 (2d ed. 1950); 12 N.A.C.C.A. L.J. 368 (1953).

us who are on the plaintiffs' side are in overwhelming numbers "dead" against state socialism; most of us do not want any state fund. But if the insurance companies and the employers continue with their tactics and keep compensation payments down and litigation high, then I predict that if we ever get state socialism, they will have brought it upon their own heads.

JUDICIAL CONTROL OF ADMINISTRATIVE DISCRETION EXERCISED BY MILITARY AUTHORITIES

*Robert Gerwig**

Introduction

Reviewability of administrative acts concededly within the discretion of public officers acting for a department or agency is a subject which frequently troubles students in the fields of both law and administration. This topic was prompted by the Supreme Court's refusal to review a court of appeals decision which applied a rule of finality to the administrative order of a military commander to declare private premises "off limits" to personnel under the officer's jurisdiction.[1] Although upon close scrutiny the particular case offers no insuperable difficulties, the implication that no discretionary act of a military commander may be examined by the courts to correct alleged abuse warrants reconsideration.

When a statute confers upon an administrative officer the authority to make decisions based upon personal judgment involving choice of alternate actions, he is said to exercise administrative descretion. The question here is the extent to which such discretion may be employed by military commanders and whether acts beyond such limits are subject to the control of the judiciary.

Generally, agency action is final and not subject to appellate review where there is authority to act and the specific act involved is reasonable. When and under what criteria will the courts seek to satisfy themselves that an officer has acted reasonably and not arbitrarily? The number of cases relating to court review of so-called discretionary administrative acts discloses an active judicial interest in the manner in which discretion is carried out. A theory that the use of discretion necessarily precludes external control, leaving the sole criterion the official's judgment, is invalid. A half century ago, the United States Supreme Court declared that although:

> "the term *discretion* implies the absence of a hard-and-fast rule . . . yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means a decision of what is just and proper in the circumstances.' "[2]

The military authorities involved in this discussion consist of the personnel of the military departments within the Department of Defense,

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[1]Harper v. Jones, 195 F.2d 705 (10th Cir. 1952), *cert. denied*, 344 U.S. 821 (1952).

[2]The Styria, 186 U.S. 1, 9 (1901); BOUVIER'S LAW DICTIONARY 305 (3d ed. 1934).

in accordance with the terms of the National Security Act of 1947.[3] As adjuncts of the executive department (Department of Defense)[4] primarily concerned with the security of the United States, the military departments are direct outgrowths of the combined constitutional power of Congress "to raise and support Armies" and "to make rules for the Government and Regulations of the land and naval Forces" and the specific authority of the President as "Commander in Chief of the Army and Navy of the United States."[5]

Early Court Action in
Questions Concerning Review of Discretion

The first pertinent federal case requiring judicial examination of military acts involved in part the question whether a district paymaster of the New York Militia in the federal service had duly expended and accounted for certain moneys received. The Circuit Court for the District of New York in 1826 held that the duties of a military officer of the United States were regulated by law and were for the court to determine.[6]

Within a year the law was changed. In 1827 the Supreme Court had occasion to pass on a number of questions involving acts of the chief executive as Commander in Chief of the militia. The constitutional power of Congress to call "forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" was implemented by the Act of February 28, 1795.[7] Failure to obey an order to enter the service as a militia-man brought the President's power to issue such an order into question. The Court, in *Martin v. Mott*,[8] upheld the order, reciting a rule which clearly precluded review of military acts done pursuant to law and enunciating a supporting philosophy:

> "The president is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in

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[3] 61 STAT. 507, 5 U.S.C. § 181-1 (Supp. 1947), as amended, 63 STAT. 591, 5 U.S.C. § 181-1 (Supp. 1947); 64 STAT. 265, 10 U.S.C. § 1a (Supp. 1950), as amended, 66 STAT. 508 (1952), 10 U.S.C. § 1a (Supp. 1954).

[4] In its original form, the Department of War was the second established executive department. It was created in 1789, two weeks after the Department of State was organized. U.S. GOV. ORG. MAN.

[5] U.S. CONST. Art. I, § 8; U.S. CONST. Art. II, § 2.

[6] United States v. Willard, 28 Fed. Cas. 608, No. 16,698 (C.C.D.N.Y. 1826).

[7] 1 STAT. 424 (1795), 50 U.S.C. § 201 (1946) provides "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officers of the militia, as he shall think proper." U.S. CONST. Art. I, § 8.

[8] 12 Wheat. 19 (U.S. 1827).

> strict conformity with the provisions of the law; and it would seem to follow . . . that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power of calling forth the militia into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. *Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.* (emphasis supplied) . . . It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."[9]

In 1842, the Supreme Court, in deciding that an army officer was not entitled to certain emoluments claimed under a regulation which had in effect been superseded by another regulation, stated:

> "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken."[10]

It logically followed that the Supreme Court should hold that Army regulations have the force of law,[11] and within a short time the Court announced a corollary principle that the authority of a state to use its military forces to enforce martial law could not be questioned by the

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[9] *Id.* at 31.

[10] United States v. Eliason, 16 Pet. 291, 301 (U.S. 1842). Note that interpretation of military regulations by the Army's Advocate General, though entitled to great weight, is not conclusive upon the courts. Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948).

[11] Gratiot v. United States, 4 How. 80 (U.S. 1846); United States v. Freeman, 3 How. 556 (U.S. 1845).

courts.[12] Thus the question whether certain defendants, acting under military orders, were justified in breaking and entering plaintiff's house was answered affirmatively.

The Court Frowns upon the Exercise of Discretion Without Justification

The rule in *Martin v. Mott, supra,* reflected the Court's early disinclination to re-examine acts of a discretionary nature founded upon a legal basis, irrespective of any element of abuse therein. By 1851, the Marshall court, which had decided the *Martin* case, had given way to the Taney regime. In that year the Court reviewed *Mitchell v. Harmony,*[13] a colorful action of trespass against a military commander involving seizure of an American citizen's property in the Mexican State of Chihauhua during the war between the United States and Mexico. Harmony, the plaintiff in the trial court, was engaged in exporting merchandise to Mexican customers. Before the war's outbreak he and other traders had set out for Mexico; following the declaration of war, they followed the Army and plied their wares as opportunity offered. While engaged in battle, the regimental commander of the United States forces used Harmony's wagons and mules; later, after evacuation by American troops, the Mexican authorities seized and confiscated what remained. Harmony sought to recover from the United States military commander for the horses and mules. In a lucid exposition of the factors involved, the Court, speaking through the Chief Justice, affirmed the judgment of the trial and circuit courts for Harmony, stating in part:

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. . . .
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> "But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. . . .
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> "The case mentioned by Lord Mansfield . . . illustrates the principle of which we are speaking. Captain Gambier, of the

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[12]Luther v. Borden, 7 How. 1 (U.S. 1849).
[13]13 How. 115 (U.S. 1851).

British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

"This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and the laws of the United States."[14]

Here, in a clear case of seizure of private property admittedly for the use of the Government, the Court, by requiring evidence that the taking was justified under the facts, departed from the apparently rigid rule that a person delegated discretionary power is the final judge of the basis upon which to act.

Chief Justice Taney was a prominent figure in the celebrated matter of *Ex Parte Merryman*.[15] Sitting for this case in the circuit court, the Chief Justice vigorously denied the authority of the President (or anyone else, save Congress) to suspend the constitutional privilege of the writ of habeas corpus. The incident arose when a prominent citizen of Baltimore, arrested by the military authorities "upon vague and indefinite charges," was imprisoned in Fort McHenry and obtained a writ of habeas corpus from Chief Justice Taney in the circuit court. In answer to the writ, the military commander claimed authority of the President to suspend the writ at his (the commander's) discretion; accordingly he refused to comply with the order. In his remarks, Chief Justice Taney drew freely upon the opinion of his predecessor, Marshall, in *Ex Parte Bollman and Swartwout*,[16] and there is little doubt but that Taney's protest of the misuse of constitutional authority was well founded.[17]

The Supreme Court departed momentarily from its shifting attitude in 1868 but only long enough to express its opinion in *United States v.*

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[14]*Id.* at 133, 135. Winthrop notes that Lt. Col. Mitchell, the defendant, was, by special Act of Congress, Mar. 11, 1852, relieved of the judgment, which was assumed and paid by the United States. WINTHROP, MILITARY LAW AND PRECEDENTS 776 (2d ed. 1920).

[15]17 Fed. Cas. 144, No. 9487 (C.C.D.Md. 1861).

[16]4 Cranch. 75 (U.S. 1807).

[17]WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 678 (2d ed. 1938).

Speed[18] as to reviewability of discretion in a limited area of activity. In construing a statute which authorized officers contracting for procurement of supplies to dispense with advertising under certain conditions, the Court declined to restrain in any way the exercise of contractual discretion:

> "It is too well settled to admit of dispute at this date that where there is a discretion conferred on an officer and the contract made in which he has exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

In 1870 the Supreme Court considered the case of a shipowner who filed in the Court of Claims a petition for compensation for the seizure and use by the military authorities, of three steamboats—the *J. H. Russell,* the *Liberty,* and *Time and Tide*—during the "rebellion." The Court of Claims awarded judgment for the plaintiff in the sum of $41,355 and the United States appealed on the ground that a federal statute excluded the case from the jurisdiction of the court.[19] Illustrative of each of the seizures, the steamer *Liberty* was taken pursuant to an order issued by a Quartermaster officer of the Transportation Department which stated:

> "Captain of the Steamer Liberty.
>
> "Sir: Imperative military necessity requires the services of your steamer for a brief period. Your captain will report at this office at once, in person, first stopping the receipt of freight, should the steamer be so doing."

The Court expressly affirmed the rule of *Mitchell v. Harmony*[20] to the effect that the Government is bound to make full compensation to the owner of property taken for use by the Army. Based on the lower court record, the Court determined that the impressed ships were in command of the owner and that he paid all the running expenses during the period the vessels were employed in the military service. Accordingly, the judgment was affirmed.[21]

In 1875 the Supreme Court considered the case of an officer in command of federal forces in South Carolina who, by specific military order, acting under broad administrative authority in connection with reconstruction powers, annulled a decree rendered by the state court of chan-

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[18] 8 Wall. 77 (U.S. 1868).

[19] 13 STAT. 381 (1864). The act, in fact, excluded jurisdiction over claims "growing out of the destruction or appropriation of or damage to property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof."

[20] 13 How. 115 (U.S. 1851).

[21] United States v. Russell, 13 Wall. 623 (U.S. 1870).

cery in a matter growing out of a civil foreclosure proceeding. The Court, through Mr. Justice Swayne, affirmed the judgment of the South Carolina Supreme Court which had disregarded the military order. In conceding that certain governmental powers were delegated to military commanders following the "war between the United States and the insurgents," the Court stated:

> ". . . But we have found nothing to warrant the order here in question. . . . It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, of any purpose to wrong or oppress. . . .
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> *"It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."*[22] (emphasis supplied)

The case of *Yick Wo v. Hopkins*,[23] decided in 1886, though not involving military considerations, is a common citation for the text writers when dealing with administrative powers. It contains a relevant general rule (as well as an eloquent statement of governmental and human principles) expressed by Mr. Justice Matthews:

> "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere

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[22]Raymond v. Thomas, 91 U.S. 712, 715, 716 (1875).
[23]118 U.S. 356 (1886).

will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[24]

In 1932, the Supreme Court affirmed a district court's holding[25] which enjoined a Governor and his chief military officers from enforcing certain orders purporting to control the production of oil from wells owned by plaintiffs.[26]

The Governor of Texas had proclaimed martial law over several of the oil-producing counties of the state. His decree stated that the counties were in "a state of insurrection, tumult, riot and a breach of the peace." A Brigadier General of the National Guard was directed to assume command of the situation and to take such steps as were deemed necessary "to enforce and uphold the majesty of the law," subject to the orders of the Governor as the Commander in Chief, as given through the Adjutant General. The complainant had previously instituted suit against the Railroad Commission to restrain enforcement of Commission orders limiting the production of oil. An amended bill joined Governor Sterling and his Adjutant General as parties, alleging that the Governor's executive and military orders were without justification, in law or in fact. A unanimous Court, speaking through Mr. Chief Justice Hughes, stated:

> ". . . Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection . . . exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainant's properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible."[27]

With no doubt whatever that "the allowable limits of military discretion are judicial questions," the Court affirmed the lower court's finding that there was no military necessity which justified "the action of the Governor in attempting to limit complainants' oil production, otherwise lawful."

To Review or Not to Review!

In *Kansas City So. Ry. v. United States*,[28] the Court rejected a con-

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[24]*Id.* at 370.
[25]Constantin v. Smith, 57 F.2d 227 (D.C. Tex. 1932).
[26]Sterling v. Constantin, 287 U.S. 378 (1932).
[27]*Id.* at 401.
[28]231 U.S. 423 (1913).

tention that regulations of the Interstate Commerce Commission were so unreasonable and arbitrary as to constitute an abuse rather than an exercise of power, and therefore should be set aside. However, in citing this case in *American Tel. & Tel. v. United States*,[29] Mr. Justice Cardozo stated:

> "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. . . . Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' as to be the expression of a whim rather than an exercise of judgment."[30]

A strong expression for the advocates of the "no review of discretion" school may be found in the words of Chief Justice Stone in the *Hirabayashi* case,[31] which upheld the power of a military commander to apply a curfew within a designated military area:

> "Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."[32]

Even, here, however, the facts generously support the judgment of the military commander, so dramatically expostulated by the Chief Justice in his description of the war tension which pervaded the circumstances. Nor should the strongly suggestive concurring opinions by Justices Murphy and Rutledge be overlooked. Justice Murphy stated:

> "In voting for affirmance . . . I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as 'military areas.' While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men."[33]

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[29]299 U.S. 232 (1936) (suit to set aside an order of the FCC prescribing a uniform system of accounts for telephone companies).
[30]*Id.* at 236.
[31]Hirabayashi v. United States, 320 U.S. 81 (1943).
[32]*Id.* at 93.
[33]*Id.* at 113.

Justice Rutledge stated:

> "I concur in the Court's opinion, except for the suggestion, if that is intended, as to which I make no assertion, that the courts have no power to review any action a military officer may 'in his discretion' find it necessary to take. . . . The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen."[34]

And in *Arenas v. United States*,[35] decided in 1944, Mr. Justice Jackson, speaking for a unanimous Court, pointed out that:

> "Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction."[36]

Despite a trio of emphatic dissenters, the Court, hard on the heels of the *Hirabayashi* case, approved a similar order which, during the existence of the state of war with Japan and as a protective measure against espionage and sabotage, directed the exclusion from a described West Coast military area of all persons of Japanese ancestry.[37]

The 1946 case of *Duncan v. Kahanamoku*[38] highlights the difficulties that the Court has always faced in determining whether it may legally enter, for purposes of review, a field allotted by Congress to agencies of legislative and executive action. The case involved two civilians residing in Honolulu. They were apprehended and convicted of other than military offenses by military authorities during a period of "martial law" duly proclaimed by the Territorial Governor of Hawaii the day Pearl Harbor was attacked. The convicted prisoners petitioned the district court for writs of habeas corpus, challenging the validity of their

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[34]*Id.* at 114.

[35]322 U.S. 419 (1944). This case concerned the petition of a Mission Indian to be awarded a trust patent to land on a military reservation. Government counsel maintained that the matter was wholly under the control and discretion of the Secretary of the Department of the Interior. The Supreme Court reversed the summary judgment of the District Court and remanded the case to permit petitioner an opportunity to establish his claim.

[36]*Id.* at 432, citing Perkins v. Elg, 307 U.S. 325, 349 (1939).

[37]Korematsu v. United States, 323 U.S. 214 (1944). Murphy, in dissenting, stated that ". . . it is essential that there be definite limits to military discretion, especially where martial law has not been declared."

[38]327 U.S. 304 (1946). One of the petitioners, White, was arrested on August 20, 1942, for embezzlement. On August 25th he was tried and convicted before a provost court and sentenced to five years imprisonment, although the sentence was later reduced to four years. Duncan was convicted by a military tribunal on March 2, 1944, of assaulting two marines on February 24, 1944, with intent to prevent the performance of their duties as sentries at the main gate of the Pearl Harbor Navy Yard. He was sentenced to six months imprisonment.

trials. The district court's finding that there was no military necessity for the trial of petitioners by military tribunals rather than by regular courts was reversed by the court of appeals.[39] Upon grant of certiorari, six members of the Court agreed with the district court and released the petitioners from custody.

The Hawaiian Organic Act[40] authorized the Territorial Governor, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, to suspend the privilege of the writ of habeas corpus or "place the Territory . . . under martial law." This statute, the majority of the Court decided, did *not* during a period of martial law give the armed forces power to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war. The Court strongly emphasized that the territorial courts of Hawaii were open and functioning during the period covered by the incidents of the two cases. Mr. Justice Burton, with Mr. Justice Frankfurter concurring, voiced sharp dissent on the ground that the military authorities did not, under the circumstances, violate vested discretion, and warned:

> "It is important . . . that in reviewing the constitutionality of the conduct of our agencies of government in time of war . . . we do not now make precedents which in other emergencies may handicap the executive branch of the Government in the performance of duties allotted to it by the Constitution and by the exercise of which it successfully defended the nation against the greatest attack ever made upon it."[41]

In 1947 a petitioner who had been given a "discharge from draft," rather than a certificate of honorable discharge asked a district court to compel the Secretary of War to issue him the formal certificate. He had been inducted at the close of World War I but had not entrained for camp when the Armistice was announced. He was one of some 155,000 other draftees who, under similar circumstances, received the same notice. The district court dismissed the action on the ground that the matter was solely within the discretion of the Secretary of War and not a subject for judicial review. The court of appeals reversed.[42] That portion of the opinion here pertinent stated that the determination of the type of discharge was indeed a proper exercise of the Secretary, but that since the Secretary's formal regulations did not provide for the particular notice that was given but in fact prescribed other forms, he had no discretion to go beyond the published regulations. The Supreme

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[39]327 U.S. 304 (1946), *reversing* 146 F.2d 576 (9th Cir. 1944).
[40]31 STAT. 141 (1900), 48 U.S.C. § 532 (1946).
[41]Duncan v. Kahanamoku, 327 U.S. 304, 357 (1946).
[42]Lamb v. Patterson, 154 F.2d 319 (D.C. Cir. 1946).

Court, however, agreed with the district court and declined to place the respondent "who got no farther than his local board . . . in a better status than the tens of thousands of other draftees who came much closer to complete integration into the Army than he ever did."[43]

The much discussed steel seizure case of 1952 was decided primarily on the premise that the chief executive is without general or inherent power to seize private property even though an emergency exists. However, a substantial part of the Government's case was founded on the argument that the President's seizure of the steel mills as a measure to aid the national defense should be sustained as an exercise of military power as Commander in Chief of the armed forces. The opinion of the Court flatly rejected this contention:

> "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief . . . has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."[44]

In 1952 the Supreme Court, over dissents by Douglas and Black, denied compensation to owners of certain waterfront terminal facilities in Manila which were destroyed by the Army to prevent them from falling into enemy hands.[45] The respondents rested heavily on *Mitchell v. Harmony*[46] and *United States v. Russell*[47] in seeking just compensation under the Fifth Amendment,[48] but the Court explained that recovery in the earlier cases was allowed because the property was impressed for subsequent use by the Army, whereas in this case the Army's objective was solely to destroy property of strategic value to prevent the enemy from using it. Adhering to the principles of *United States v. Pacific R.R.*,[49] the Court, in reversing the Court of Claims, upheld the decision of the military commander to destroy privately owned property to prevent its use by the enemy, and denied the alleged constitutional right to recovery.

In reversing two convictions affirmed by the court of appeals for

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43Patterson v. Lamb, 329 U.S. 539 (1947).

44Youngstown Sheet & Tube Company v. Sawyer, 103 F. Supp. 569 (D.C. D.C. 1952), *aff'd*, 343 U.S. 579 (1952).

45United States v. Caltex, 344 U.S. 149, *rehearing denied*, 344 U.S. 919 (1952).

4613 How. 115 (U.S. 1851).

4713 Wall. 623 (U.S. 1870).

48". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V.

49120 U.S. 227 (1887). During the War Between the States, Northern Army commanders found it necessary to destroy bridges owned by the railroad. In considering whether this act constituted a compensable taking by the Government, the Court stated: "The necessities of the war called for and justified this. The safety of the state in such cases overrides all consideration of private loss."

violations of the Selective Training and Service Act of 1940, the Court in 1946 considered the general problem of judicial review of administrative action. Mr. Justice Douglas, speaking for the Court, said then:

> "Except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses."[50]

Therefore, the Court concluded, the military draft act which provided that decisions of the local boards would be "final"[51] meant:

> "that Congress chose not to give administrative action under the Act *the customary scope of judicial review which obtains under other statutes.*"[52] (emphasis supplied)

The almost inescapable conclusion was that judicial review would be accepted as the rule, except where expressly precluded by statute. But even the "finality" purportedly guaranteed by statute was recently subjected to critical review in *Dickinson v. United States*[53] when the Court, in a five to three opinion, stated that:

> "[its task] in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities."[54]

To forestall any hasty conclusions, attention is invited to *Orloff v. Willoughby*[55] wherein the Court refused to interfere with the Army's classification and assignment of a drafted doctor. Just a few months before the *Dickinson* decision was announced, Mr. Justice Jackson expressed the following attitude on judicial intervention into matters left to military discretion:

> ". . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[56]

Aside from the foregoing Supreme Court cases, there are two courts of appeals cases, *Ainsworth v. Barn Ballroom Co.*[57] and *Jones v. Harper*,[58] involving acts of military commanders to declare certain com-

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[50]Estep v. United States, 327 U.S. 114 (1946).

[51]Act of Congress, 16th September, 1940, 54 STAT. 885, 893 (1940), 50 U.S.C. App. § 302 (1946).

[52]Estep v. United States, 327 U.S. 114 (1946).

[53]346 U.S. 389 (1953).

[54]Dickinson v. United States, 346 U.S. 389, 396 (1953).

[55]345 U.S. 83 (1953).

[56]*Id.* at 94. The reader will not miss the thrust of this remark. What constitutes "legitimate Army matters" and "judicial matters" is, of course, the problem that is underscored throughout this discussion.

[57]157 F.2d 97 (4th Cir. 1946).

[58]195 F.2d 705 (10th Cir. 1952).

mercial establishments "off limits" to their personnel, which, if literally accepted, completely preclude any review of administrative discretion by the courts in analogous situations.

In the former case the Court of Appeals for the Fourth Circuit reversed a district court decision that the question whether a joint Army-Navy order declaring premises of a public dance hall "off limits" or "out of bounds" to enlisted personnel was beyond the jurisdiction of the respective commands and was a judicial matter which could be inquired into by the courts. The court flatly asserted:

> "If the order was within the discretionary authority of the heads of the War and Navy Departments . . . the consequential damage which followed the making and enforcing of the order clearly would not create a justiciable controversy. This is so, even if it be conceded there was an abuse of discretion. And as has been pointed out time and again, the courts may not invade the executive departments to correct alleged mistakes arising out of abuse of discretion. For to do so would interfere with the performance of government functions and vitally affect the interests of the United States."[59]

In *Jones v. Harper, supra,* a junior army officer complained to his commander that a used car dealer had defrauded him in a business transaction, as a consequence of which the commander, acting under the authority of executive regulations to maintain discipline, health and welfare of his troops, declared the dealer's establishment "off limits" to the military. In an action by the dealer for an injunction the district court awarded judgment for the plaintiff, saying in part, that:

> "The power to enter an 'off limits' order for the purpose of 'maintaining discipline and safeguarding the health and welfare of military personnel' is not questioned. But such an order cannot be entered arbitrarily for some other and entirely different purpose. Here there was an attempt to substitute executive command for the orderly judicial procedure which was available for the settlement of this controversy. If defendant has the *power* under these circumstances to lawfully enter this executive order, from which there is no appeal, military officers can at will enter similar orders against legitimate business or professional men who incur their displeasure and the courts will be powerless to inquire into an abuse of discretion in the exercise of such power.
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> "If the defendant had been acting within the scope of his power, this court could not inquire into the wisdom of his act. . . . How-

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[59]Ainsworth v. Barn Ballroom Co., 157 F.2d 97, 100 (4th Cir. 1946).

ever, there was a complete lack of power to make the order. Hence, no question of abuse of discretion is involved.

"The plaintiffs' right to enjoy the patronage of military personnel is a property right. The loss of this property right was not incidental to a lawful order entered for an authorized purpose such as safeguarding the health and welfare of military personnel. The order here was entered for the purpose of depriving plaintiffs of that property right and had that effect. It constituted a taking of private property without due process of law."[60]

Upon review, the Court of Appeals for the Tenth Circuit reversed the district court, taking the view that what is necessary for the discipline of military personnel and to safeguard their health and welfare is to be determined by the commanding officers and not the courts, citing the *Barn Ballroom* case, *supra,* in support.[61] The court conceded that equity has jurisdiction to restrain the act of a federal officer which is found to be in excess of his authority or under authority not validly conferred.[62] Nevertheless, it relied on its ultimate conclusion at least partially on the non-military case of *Dakota Central Telephone Co. v. South Dakota ex rel. Payne,*[63] which stated that a contention alleging that the President had exceeded his authority

". . . at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given . . . [and] . . . involves considerations which are beyond the reach of judicial power."[64]

The court properly cited the *Barn Ballroom* case, *supra,* in reversing the district court decision, but whether the non-military case of *Duke Power v. Greenwood County*[65] or the case of *Ferris v. Wilbur,*[66] which were also cited, were pertinent to the principal issue involved in *Harper v. Jones, supra,* is seriously doubted. The court's dismissal, without discussion, of the contention that the order by the military commander constituted a taking of property without due process of law[67] leaves

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[60]98 F. Supp. 460, 461 (D.C. Okla. 1950).
[61]Jones v. Harper, 195 F.2d 705 (10th Cir. 1952).
[62]*Id.* at 706.
[63]250 U.S. 163 (1919).
[64]*Id.* at 184.
[65]91 F.2d 665 (4th Cir. 1937).
[66]27 F.2d 262 (4th Cir. 1928).
[67]*Id.* at 264, wherein the court said: ". . . Private property cannot be taken for public use without just compensation, nor can persons be deprived of property without due process of law. . . . The question is whether storage of explosives on government owned land near plaintiff's property authorized by act of Congress can be enjoined by the courts as a nuisance. The question, we think, answers itself. Of course, if what is done by officials under authority of law amounts to a taking of private property for public use, the owner is entitled to just compensation in a proper proceeding."

much to be desired in the settlement of issues of this kind, the implications of which far surpass the immediate problem posed by the facts.[68]

Federal Administration Procedure Act

Although not adverted to previously in view of its comparatively recent origin and the relatively few definitive published appellate opinions as to its applicability, the effect of the Administrative Procedure Act[69] upon peacetime acts of military commanders should be given consideration in analyzing the problem.

Section 2(a)(3) of the Act excludes from the operation thereof "military or naval authority exercised *in the field in time of war or in occupied territory.*" The Hawaii District Court has held that the Army in setting up a military government in Hawaii legally was not "in the field" within the meaning of the cited provisions.[70] It was also stated in the case that the Act "supports the point that outside of the exceptions mentioned, the Army is an 'agency' of the United States."[71] In this connection, the Judge Advocate General of the Army has applied the provisions of the Act to an administrative determination of the Army in connection with declining to furnish certain confidential medical records to a member of the service.[72] The Court of Appeals of the District of Columbia applied the Act so as to preclude review of a determination made by the Army Discharge Review Board.[73]

Section 10(e) of the Act provides that:

> ". . . the reviewing court shall decide all relevant questions of law . . . [and] shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ."

The enactment of Section 10(e) of the Act makes it clear that ad-

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[68]It should be remembered that denial by the Supreme Court of a petition for writ of certiorari "imports no expression of opinion upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923). "It simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court." Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950).

[69]60 STAT. 237, 5 U.S.C. § 1001 *et seq.* (1946).

[70]The court stated: ". . . passing notice may be taken of the suggested possibility that under our facts § 1001 (a) (3) of 5 U.S.C.A. (Administrative Procedure Act) excludes the Army from being an 'agency' of the United States. This suggestion has no merit for even if the Act were applicable, the Army in Hawaii legally was not 'in the field' or in 'occupied territory,' even though in fact it acted in that manner. . . ." Kam Koon Wan v. Black, Ltd., 75 F. Supp. 553 (D.C. Hawaii 1948).

[71]*Ibid.*

[72]10 J.A.G. BULL. 87 (1951).

[73]Gentila v. Pace, 193 F.2d 924 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 943 (1952).

ministrative action within the purview of the Act which violates any of the sanctions therein contained is subject to review and correction by a court of review. Although the Act has not yet been applied to the administrative action of a military commander in declaring private premises "off limits" to military personnel, it is believed that the Act makes available a specific remedy to an individual who deems his property rights to have been injured under circumstances indicating misuse of authority.[74]

Conclusions

It is well-nigh impossible to formulate a rigid rule based on the pronouncements of the Supreme Court in the cases which were selected as a basis for this article.

During the early years, to be sure, the Court steadfastly refused to inquire into the basis for discretion exercised by military commanders.[75] But beginning with *Harmony v. Mitchell, supra,* the Court seemed aware of the need for reexamining the circumstances which gave rise to discretionary acts of military officers.[76] And from time to time, the Court, in non-military matters, expressed general rules which must be considered in any summation.[77] When repercussions of the Second World War clouded judicial horizons, the pendulum appeared to swing once more, somewhat naturally, perhaps, toward a judicial reluctance to subject military authority to searching review.[78] But even during the period of a war-conscious tribunal, the Justices occasionally found it necessary to restrain the military from unlimited use of discretion.[79] Sometimes the line between military and civil officer was not too finely drawn but the pertinent language of the cases discloses a tendency to fluctuate, back and forth, from "review" to "no review."

The significance of the Administrative Procedure Act is not yet clear, but the report of a subcommittee of the House Judiciary Committee (on the then proposed Act) may be enlightening:

"There has been much misunderstanding and confusion of

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[74]66 HARV. L. REV. 350 (1952).

[75]Martin v. Mott, 12 Wheat, 19 (U.S. 1827); United States v. Eliason, 16 Pet. 291 (U.S. 1842); Luther v. Borden, 7 How. 1 (U.S. 1849); United States v. Speed, 8 Wall. 77 (U.S. 1868).

[76]Harmony v. Mitchell, 13 How. 115 (U.S. 1851); United States v. Russell, 13 Wall. 623 (U.S. 1870); Raymond v. Thomas, 91 U.S. 712 (1875); Sterling v. Constantin, 287 U.S. 378 (1932).

[77]Yick Wo v. Hopkins, 118 U.S. 356 (1886); Kansas City So. Ry. v. United States, 231 U.S. 423 (1913); American Tel. & Tel. v. United States, 299 U.S. 232 (1936); Arenas v. United States, 322 U.S. 419 (1944); Estep v. United States, 327 U.S. 114 (1946); Dickinson v. United States, 346 U.S. 389 (1953).

[78]Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Patterson v. Lamb, 329 U.S. 539 (1947); United States v. Caltex, 344 U.S. 149, *rehearing denied,* 344 U.S. 919 (1952); Orloff v. Willoughby, 345 U.S. 83 (1953).

[79]Duncan v. Kahanamoku, 327 U.S. 304 (1946); Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.C. D.C. 1952), *aff'd,* 343 U. S. 579 (1952).

terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not willfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence *they cannot act in disregard of or contrary to the evidence or without evidence.* They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes, or other limitations recognized by law."[80] (emphasis supplied)

"Under our system of law," says Judge Holtzoff, "the civil power is paramount over the military and . . . military authority must be exercised within the ambit authorized by Congress."[81] Perhaps Judge Holtzoff was thinking of the grievance listed by Jefferson in the Declaration where it was asserted that the King "has affected to render the Military independent of and superior to the Civil power."[82]

Hazarding a guess as to the future official view of the Court always places the prognosticator on unsteady footing; but it seems safe to say that if, upon preliminary examination, the facts cry out for reversal because of an obvious violation of fundamentals of justice, there is little doubt the Court will declare the challenged act beyond the scope of the officer's discretionary authority and set it aside. The writer agrees with Willoughby when he states:

> ". . . the grant of . . . arbitrary power will not be upheld except in those cases in which comparatively unimportant private interests are involved," [presumably such as the proprietors of questionable lodgings, amusement places and minor business enterprises] "or where the requirements of administrative efficiency demand the existence of such an authority" [perhaps like the curfew situation in *Hirabayashi* case.][83]

More likely than not, the Court will forego stating a definitive general rule, preferring rather to decide each case on its facts without resort to an inflexible formula.[84]

The writer frankly believes that when discretion is so far sup-

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[80]McFarland & Vanderbilt, Cases on Administrative Law 879 (2d ed. 1952).
[81]Toth v. Talbott, 114 F. Supp. 468 (D.C. D.C. 1953); 25 Miss. L.J. 277 (1954).
[82]Declaration of Independence.
[83]Willoughby, Principles of the Constitutional Law of the United States 719 (2d ed. 1938).
[84]"The variability of both the theory and practice . . . reveals again the futility of attempting to use precise formulas to govern either the area or the scope of review. . . . The variability from case to case will surely continue." Davis, Administrative Law 850 (1951).

planted by arbitrary will, unsupported except by the power to employ choice in the determination, that it becomes in fact a legalistic subterfuge for the imposition of personal will, courts are duty bound to inquire into the basis for the action taken and to correct substantial injustice. In brief, when discretion is so emasculated that it cannot longer be recognized as the "decision of what is just and proper,"[85] it should be subject to judicial control.

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[85]The Styria, 186 U.S. 1, 9 (1901); BOUVIER'S LAW DICTIONARY 305 (3d ed. 1934).

CLOSING AGREEMENTS AND COMPROMISES UNDER THE NEW POLICY OF THE INTERNAL REVENUE BOARD

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In order to save the annoyance, uncertainty and expense involved in litigation it is often advisable to amicably settle issues by mutual concessions. Aside from the running of the Statute of Limitations a tax liability may be ended by (1) a closing agreement or (2) a compromise.

The "closing agreement" is a method by means of which we settle a tax controversy on the merits of the case. It does not depend on the taxpayer's ability to pay the amount involved. It is conclusive in the absence of fraud and the courts will consider only whether the agreement was executed according to statutory requirements. Consideration is not an essential element.

A "compromise" is a contract by means of which civil or criminal cases are settled by mutual concessions. Its validity depends upon (1) consideration and (2) whether the parties are capable of entering into the contract. As a rule compromises are entered into in cases where the taxpayers are unable to pay the taxes. It may be reviewed by the courts as to its validity and as to its meaning. A mutual mistake of a material fact can be grounds for relieving the parties from performance.[1]

The Commissioner, or any other officer or employee of the Bureau of Internal Revenue so authorized by the Commissioner in writing, may enter into a written closing agreement with any taxpayer or his duly authorized representative in regard to any federal tax for any taxable period. The purpose of the closing agreement is to dispose of tax controversies and to wipe out obligations on the part of the taxpayer and the Government.[2] Upon its approval by the Secretary of the Treasury, the Under Secretary or any Assistant Secretary within an agreed period, the agreement becomes final and conclusive. Once approved, the case cannot be reopened as to matters agreed upon, nor can the agreement be modified by a Government agent, unless there is proof of fraud, malfeasance or misrepresentation of a material fact. The agreement or any determination, assessment, collection, payment, abatement, refund or credit made under it, cannot be modified or set aside in any suit, action or proceeding.[3] It has the attributes of a mutual release which cannot

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[1]Associated Mutuals, Inc. v. Delaney, 176 F.2d 179 (1st Cir. 1949); Colorado Milling & Elevator Co. v. Howbert, 57 F.2d 769 (10th Cir. 1932); Big Diamond Mills Co. v. United States, 51 F.2d 721 (8th Cir. 1931).

[2]Proctor v. White, 28 F. Supp. 161 (D.C. Mass. 1939).

[3]INT. REV. CODE § 3760; Perry v. Page, 67 F.2d 635 (1st Cir. 1933), *cert. denied,* 292 U.S. 632 (1933).

be set aside except on grounds stated in the statute.[4] The agreement may cover existing or future tax liability. It need not relate to the total tax liability of a taxpayer, but may relate to one or more items affecting his liability. An agreement can be entered into with respect to his gross income, deduction for losses, depreciation, depletion or the value of property on a basic date. There can, therefore, be a series of agreements relating to the tax liability of a single taxpayer for a single tax period.[5] A closing agreement is binding even if without consideration where the agreement is for the full amount claimed by the Government. Where there is uncertainty as to the tax effect of a contemplated course of action, a closing agreement affords the only means of conclusively fixing the tax consequences. The Commissioner's rulings are not binding in the absence of a closing agreement.[6]

A taxpayer cannot attack a closing agreement and have it set aside because of his own fraud or that of his agents.[7] In order to set it aside, the fraud must be that of the party upholding it and the burden of proving fraud is on the party seeking to set it aside. The fraud must relate to the closing agreement and not to the original return.[8] Where supported by substantial evidence the Tax Court's finding of fraud, malfeasance or misrepresentation of fact is final. Upon review, the circuit court cannot substitute its judgement for that of the tax court.[9]

Any person who, in connection with a closing agreement, wilfully (1) conceals from a government officer any property belonging to a taxpayer (2) receives, destroys, mutilates, or falsifies any books or records or (3) makes any false statement under oath relating to the estate or financial condition of a taxpayer may, on conviction, be fined not more than $10,000 or be imprisoned for not more than one year or both.[10]

An agreement can be set aside where the agent had no authority from the taxpayer to enter into the agreement.[11] Therefore, in all cases where final agreement is executed by a person other than an individual taxpayer, the Bureau requires documentary evidence showing authority to execute the agreement on behalf of the taxpayer.[12] Where the taxpayer is a corporation, the agreement must be signed in the corporate name by the officer or officers empowered to sign on behalf of the cor-

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[4]Charles S. Payson, P-H 1947 TC MEM. DEC. ¶ 47,147 (1947), *aff'd*, 166 F.2d 1008 (2nd Cir. 1948); *In re* Liebster, 91 F. Supp. 814 (D.C. Pa. 1950); Proctor v. White, 28 F. Supp. 161 (D.C. Mass. 1939).

[5]T.D. 4855, 1938-2 CUM. BULL. 252.

[6]Knapp-Monarch Co. v. Commissioner, 139 F.2d 863 (8th Cir. 1944).

[7]Hering v. Tait, 65 F.2d 703 (4th Cir. 1933).

[8]Commissioner v. Ingram, 32 B.T.A. 1063, *aff'd*, 87 F.2d 915 (3rd Cir. 1937).

[9]Helvering v. Kehoe, 309 U.S. 270, *reversing* 105 F.2d 552 (3rd Cir. 1939).

[10]INT. REV. CODE § 3762.

[11]Merchants' National Trust & Savings Bank of Los Angeles v. Welch, 8 F. Supp. 949 (D.C. Cal. 1934), *app. dismissed*, 75 F.2d 1023 (9th Cir. 1935).

[12]MIM. 3652, VII-2 CUM. BULL. 252.

poration under the laws of the state in which the firm is incorporated. The agreement must have the corporate seal and must include an affidavit reciting the above facts.

In the following instances it is advantageous to taxpayers to enter into closing agreements which fix the total tax to be paid for the taxable periods covered:

(1) When fiduciaries desire to facilitate settlement of the estate;

(2) When a corporation is contemplating or in the process of dissolution;

(3) When a bank or other creditor desires a final determination of tax liability for reasons of credit;

(4) When a taxpayer is anxious to know his final tax liability to date before entering new business transactions; and,

(5) When adjustments are necessary under the provisions which remove the bar of the Statute of Limitations.

In applying for a closing agreement covering total tax liability, taxpayers should show that no disadvantage to the Government can result from its approval.[13]

The Commissioner, with the approval of either the Secretary, Under Secretary, or Assistant Secretary of the Treasury has authority to compromise any civil or criminal case arising under the Internal Revenue Laws before referring the case to the Department of Justice. The Attorney General has similar authority in cases referred to the Department of Justice.[14] In practice, the broad powers of the Commissioner are used almost invariably only to dispose of tax liability--either when the amount is acknowledged or in dispute—when the taxpayer is financially unable to satisfy the Government's claim in full. The exception is in regard to the penalty for delinquency in the failure to file a return. This penalty the Commissioner will compromise regardless of taxpayer's financial ability, depending on the degree of culpability.[15]

The first step is the offer of compromise made by the taxpayer, accompanied by a sworn and detailed statement of financial condition filed with the Collector. The offer must be accompanied by a deposit of the sum offered. If rejected, the deposit will be refunded[16] unless the taxpayer authorizes the money to be applied against a tax assessment.[17]

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[13]T.D. 4855, 1938-2 Cum. Bull. 252.
[14]Int. Rev. Code § 3761.
[15]Int. Rev. Code § 291 (a).
[16]T.D. 3652, III-2 Cum. Bull. 413 (1924).
[17]Rasmussen v. Brownfield-Canty Carpet Co., 31 F.2d 89 (9th Cir. 1929).

If principal liability is less than $1000 and no fraud penalty is involved, the initial investigation of the taxpayer's ability to pay is made by the Collector. If fraud penalties or larger amounts are involved, the offer is handled by the agent in charge. The results of the investigation are reported to a supervisor. Ultimately a report is prepared by the investigator, along with the recommendation as to acceptance or rejection; the report is transmitted to the local Staff Division Office. The file is referred to a conferee for further study. The Staff Division head has final authority to reject the offer. If he rejects it, he notifies the taxpayer; if he accepts it, he initals a form letter to the Secretary to be signed by the Commissioner. The file then goes to the Division Counsel, who initials a memorandum recommending acceptance if he agrees. If he disagrees, he prepares a dissenting memorandum to accompany the file. The file goes to the Commissioner's office in Washington for review by one of his assistants. Then, if the Commissioner personally approves the compromise, he recommends it to the Secretary and the case is sent to the office of the Chief Counsel. If it is approved there, the case is again reviewed by an assistant to the General Counsel to the Treasury Department, who then puts the offer before the Secretary of the Treasury for formal approval. This method is cumbersome and therefore infrequently used, but it is the only way in which to obtain a binding agreement. Any other procedure cannot be used to obtain a valid compromise.[18] A voluntary disclosure of understatement of tax liability and payment of additional tax does not constitute a compromise of tax liability in the absence of evidence of compliance with the provisions of the statute as to compromises.

A compromise is binding on both parties and prevents either the taxpayer or the Government from reopening the disputed tax.[19] A mistake of fact on the part of the taxpayer voids the compromise. Thus, where the taxpayer was ignorant of the existence of an over-assessment credited without the knowledge of the taxpayer, the compromise did not prevent him from recovering the over-assessment.[20] A mistake of law prevents the operation of the compromise.[21] A compromise made under duress may also be set aside, but the routine serving of a notice of distraint does not constitute duress.[22]

Interest and penalties constitute a part of the tax. The two may not be divorced and the interest or penalty compromised separately.[23] It has

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[18]Botany Worsted Mills v. United States, 278 U.S. 282 (1929).

[19]United States v. Lustig, 163 F.2d 85 (2nd Cir. 1947), *cert. denied,* 332 U.S. 775 (1947); Lone Star Brewing Association v. United States, 61 Ct.Cl. 118, *cert. denied,* 271 U.S. 680 (1925).

[20]Arkwright Mills v. United States, 27 F.2d 550 (D.C. Mass. 1928).

[21]Cloister Printing Corporation v. United States, 100 F.2d 355 (2nd Cir. 1938).

[22]Shaw & Truesdell Co. v. United States, 1 F. Supp. 834 (D.C. N.Y. 1932).

[23]Big Diamond Mills Co. v. United States, 51 F.2d 721 (8th Cir. 1931).

been held that a compromise of interest acknowledges the liability of the tax, since if the taxpayer were not liable for the principal he could not be liable for the interest.[24] If the interest is compromised, and in spite of this a refund of the tax is subsequently obtained, the interest is also refundable, but at the reduced rate agreed on in the compromise.[25]

Provisions for closing agreements have been contained in the Revenue Acts since 1921. The approval of closing agreements by the Assistant Secretary of the Treasury was considered valid and the signature of the equivalent of the Secretary or Under Secretary as giving it finality. Closing agreements entered into on and after May 28, 1938, must follow the regulations promulgated in regard to those specific agreements.[26] Forms 866 and 906 can be used for that purpose.[27]

Generally, the closing agreement must be executed by the taxpayer, or a power of attorney must be produced showing authorization to agent or attorney to enter into the particular closing agreement. Corporate closing agreements must be made out by the corporation through its authorized officers as shown by resolution of the board of directors. The execution of Form 874 does not constitute a closing agreement.[28] A closing agreement, if properly executed, has the effect of terminating and disposing once and for all of the tax controversy involved.[29] Closing agreements procured through fraud, malfeasance or misrepresentation of a material fact are invalid under the law. Such closing agreements are absolutely null and void and in such cases the tax liability may be redetermined at once without the necessity of attacking the closing agreement through judicial process.[30] Something more positive and deliberate than a failure to disclose, embodying no element of wilfulness, is necessary to justify the setting aside of a closing agreement.[31]

The statutory provision as to unnecessary examinations upon a search for fraud and misrepresentation means little since the taxpayer may waive the benefit of its provisions and request a further examination, and the Commissioner may deem a further examination necessary.[32] With the exception of fraud cases, it is the general rule of prac-

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[24]Lang-Kidde Co. v. United States, 2 F. Supp. 768 (1933).

[25]Colorado Milling & Elevator Co. v. Howbert, 57 F.2d 769 (10th Cir. 1932).

[26]INT. REV. CODE §§ 3760, 3801 (a) (1) (A); T.D. 4855, 1938-2 CUM. BULL. 252; MIM. 4821, 1938-2 CUM. BULL. 254; MIM. 6383, 1949-2 CUM. BULL. 100.

[27]Charles S. Payson, P-H 1947 TC MEM. DEC. ¶ 47,147 (1947), *aff'd*, 166 F.2d 1008 (2nd Cir. 1948).

[28]Universal Oil Products Co. v. Campbell, 181 F.2d 451 (7th Cir. 1950).

[29]Consolidated Naval Stores Co., T.C. Mem. Op. Dkt. No. 17167, August 8, 1950.

[30]Boatman's National Co. v. Elkins & Co., 63 F.2d 214 (8th Cir. 1933); Carter Music Co. v. Bass, 20 F.2d 390 (D.C. Tex. 1927); G.C.M. 4914, VII-2 CUM. BULL. 181.

[31]Cabin Creek Consolidated Coal Co. v. United States, 137 F.2d 948 (4th Cir. 1943).

[32]Marx v. Commissioner, 13 T.C. 1099 (1949); Bernheim v. Commissioner, 15 B.T.A. 608 (1929); Foster & Parks v. Commissioner, 12 B.T.A. 715 (1928); McDonnell v. Commissioner, 6 B.T.A. 685 (1927).

tice for the courts to deny the Government examinations in connection with tax years on which the Statute of Limitations has run.[33]

It has been the custom of the Commissioner to periodically announce the conditions under which these agreements will be entered into.[34]

Compromises in tax cases are entered into in order to avoid the determination of sharply contested and dubious issues, thereby enabling the Government and the taxpayer to save the expense and trouble caused by litigation. Compromises were seldom made during periods of great prosperity. Since 1929 economic hardships have befallen taxpayers, and the complexity of tax burdens of proof have encouraged taxpayers and advisers to use the method of compromise to fill in the legal gaps existing in certain cases.

As already pointed out, compromises are governed strictly by the numerous statutory provisions. Compromise offers are made on Form 565 in duplicate and are filed with the Collector. Where the taxpayer wishes to fulfill his compromise offer by deferred installment payments with interest at 6% per annum, he should use Form 656-C. In all these matters the Collector makes his recommendations to the Commissioner. A check for the compromised amount must accompany the filing of the form.

Treasury Department policy is now less favorable to compromises of large income tax liabilities; the procedure is now to resort to all the usual procedures to collect. Compromises will not be entered into merely upon the ground that the case excites sympathy or is appealing from an equitable point of view.

In conjunction with its provisions for entering into compromises, the statute contains severe penalties upon any taxpayer who wilfully conceals his assets for the purpose of establishing the required conditions for bargaining with the Government.[35] Suits brought by or against the United States in tax matters may be compromised.[36]

The new set-up of the Bureau of Internal Revenue reveals the assumption of a tougher attitude in collection. The first tax officials to emerge from the reorganization of the tax collection machinery received a lively reception at a Bureau-staged forum in Chicago. Attorneys, accountants, trust officials and taxpayers were interested in two main questions: (1) How does the new set-up affect the taxpayer's dealings with the Bureau? (2) With whom will the taxpayers be dealing when they have a tax problem?

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[33]In re Paramount Jewelry Co., 80 F. Supp. 375 (D.C. N.Y. 1948).
[34]Richmond, *Bureau Rulings—How and When to Obtain*, 28 TAXES 45 (1950).
[35]INT. REV. CODE § 3762.
[36]Beard v. United States, 76 F. Supp. 715 (1948).

The taxpayer can expect speedier service and he can expect his return to receive closer scutiny, especially if he is in the higher tax brackets. The new set-up places the job of Collector of Internal Revenue under Civil Service for the first time. The inspection service has been expanded, the control over employees strengthened, offices have been consolidated, and authority to make decisions in the field has been expanded. The changes are aimed at careless taxpayers and not at corrupt tax collectors. In place of the appointed Tax Collector there are now sixty-four District Directors in Internal Revenue. These men must qualify under Civil Service; the quality of men in these positions will determine whether or not the new system will be an improvement.

The states of Illinois and New York will act as models of the new system for the rest of the nation. The first change under the new plan is that conferences on disputed points on tax returns will be speeded up. Some tax experts are inclined to disagree with this procedure since the extra speed will be attained by dropping one conference step. They are afraid that taxpayers will not get a thorough hearing. The designers of the system claim that the two remaining conferences will assure a thorough consideration of taxpayers' complaints. At present a taxpayer who disagrees with the finding of a revenue agent may have to wait seven months before he can have a conference at the next level. The Bureau hopes to relieve this situation by halving the case load of conference leaders.

The new set-up expands the Appellate Division from twelve such bodies to sixty-four; each of the Districts will have an Appellate Division with full authority to make final decisions. To staff this expansion, conference sections previously attached to the office of chief revenue agents will be switched to the Appellate Division.

Under the new plan there will be a consolidation of field offices of Collectors, revenue agents, alcohol and tobacco tax agents and the Appellate Division under the District Director. Furthermore, there will be only one audit of taxpayers' books.

Taxpayers' rights to sue the Collector for refunds of taxes illegally collected are unimpaired. The District Director is subject to suit in the same instances as was the Collector of Internal Revenue. He must be sued individually, and if he is transferred, the suit will have to be filed at his new location. The Bureau has assured taxpayers that the switch of personnel to the Appellate Division does not change old procedures. The Bureau also claims that they will closely watch the decisions of the sixty-four offices in order to maintain some uniformity.

Under the new plan final selection for each job will be made from three candidates approved by the Civil Service Commission. In most

instances, this will still leave the administration with a free hand to choose the man they want. It will not necessarily eliminate corruption. Integrity of personnel and more adequate salaries are more effective guarantees than Civil Service.

The final hope of the Government is that the new system will be more efficient. The more returns checked, the more profit the Government receives. Out of 44.8 million nonbusiness returns received in 1949, the Bureau found errors in 10.2 million or 23%. Nine out of ten errors understated the tax owed. Business returns are even more fruitful. Out of 7.2 million filed, 3.5 million, or 48%, showed errors. In the top income brackets, mistakes showed up in 82% of the returns. The Bureau estimates that one man checking high-income returns for a year can recover $272,000 in taxes owed. The Bureau also intends to give the lower brackets the same intensive treatment.

Whether or not the new system will be as vast an improvement as the Government hopes, remains to be seen. It is felt, however, that closing agreements and compromises will still play an important part in the settlement of disputed matters in the field of taxation.

State Bar Section

THE ADEQUATE AWARD IN MISSISSIPPI

*Ross R. Barnett**

The theory of damages has been a part of civilization since early Biblical times.[1] The fundamental theory of damages is that just compensation should be awarded for a loss or injury sustained and to replace the loss caused by the acts of the wrongdoer.[2] It is submitted that down through the ages the law has suffered from a practice of copying—that is to say, in many instances it has given too much consideration to what is, rather than what should be. This has been true in damages as well as in other fields of the law. In recent years there has come about a general consensus that the dignity of the individual should be more honestly recognized, for it is now an established fact that the progress of any country is co-extensive with its treatment and recognition of the rights of its individual citizens.

In the last few years, the trend of verdicts for serious personal injuries and deaths has been toward more adequate and fair compensation. One reason for this is the greater appreciation of the value of a human body and a human life. Another reason for this trend is the high cost of living prevalent during the last ten or fifteen years and the unparalleled decrease in the purchasing power of money. The cost of living has more than doubled. The Mississippi Supreme Court has taken notice of the inflationary conditions of the country, and in *Gulf Transport Co. v. Allen*[3] said:

> "This court, in former decisions, in passing on the size of verdicts in comparison with others, took note of inflationary conditions in the country, with the consequent decrease in the purchasing value of money."

Compensation means compensation in value. A jury can only render a money verdict. If a man loses his arm or leg, there is no way for the jury to give him another natural limb. If a person is killed, there

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[1]EXODUS 21:23 requires an "eye for eye, tooth for tooth, hand for hand, foot for foot." EXODUS 21:33-34 states that " . . . if a man dig a pit and not cover it and an ox or an ass fall therein, the owner of the pit shall make it good and give money unto the owner of them and the dead beast shall be his."

[2]Phillips Petroleum Co. v. Entrekin, 209 Miss. 302, 46 So.2d 781 (1950); 25 C.J.S., DAMAGES § 3.

[3]209 Miss. 206, 46 So.2d 436 (1950); St. Louis-San Francisco Ry. v. Dyson, 207 Miss. 639, 43 So.2d 95 (1949).

is no way the jury can bring him back to life. It can only render a verdict in dollars and cents.[4]

When speaking of a verdict, one usually has in mind the number of dollars that the jury has awarded, but compensation means compensation in value. For example, $50,000 is worth no more than $25,000 was worth fifteen years ago.[5] It is not the number of dollars, but the value of the dollars that counts. The Mississippi Supreme Court commented on this question in *Laurel Light & Railroad Co. v. Jones*,[6] and stated that the value of money is entitled to be considered in determining whether or not a particular verdict is excessive. In 1929 the court said:

> "This Court knows that the purchasing power of a dollar since the World War has been reduced to about 50% of its value prior thereto."[7]

It seems to be a general rule that an appellate court is entitled to consider changes in the cost of living when determining whether or not a particular verdict should be reduced or set aside as excessive.[8]

Damages for Injuries

It is a general rule in Mississippi that in estimating damages for personal injuries, the jury may consider loss of earnings, pecuniary expenses, medical, doctor and hospital bills, mental and physical suffering resulting from the injuries and further damages for loss of health, time and use of the body functions.[9]

Recently in *Vascoe v. Ford*,[10] the Mississippi court held, for the first time, that disfigurement of the body as a result of injuries may be considered a proper element of damages, regardless of whether or not the scars are accompanied by pain and suffering. This case overruled prior decisions in Mississippi on this point and is definitely an indication of a trend in the right direction. There would seem to be no doubt but

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[4]In Mexico, there is a system whereby, if a man is killed, his heirs can recover a verdict which is similar to an award of alimony in this state. If he is a married man, the court will award a judgment providing that the dependents shall be paid so much compensation a month, so long as the widow remains unmarried and so long as there are dependent children. This is entirely different from the jurisprudence in this country.

[5]United States News & World Report, Oct. 9, 1953, p. 15, col. 2. "The 100 cent dollar of 1939 is a 52 cent dollar today. Three years ago, before Korea, the dollar was worth 58 cents when compared with the dollar of 1939." This inflationary trend may be illustrated by comparing the costs of specific items in 1939 and 1951. Cheese prices increased from twenty-three cents per pound to forty-nine cents; ham, from twenty cents per pound to sixty-nine cents per pound; and coffee, from fifty cents for four pounds to eighty-four cents for one pound.

[6]137 Miss. 143, 102 So. 1 (1924).

[7]Cottonmill Products Co. v. Oliver, 153 Miss. 362, 121 So. 111 (1929).

[8]See Notes, 12 A.L.R.2d 611, 619, 644 (1950).

[9]Grenada Dam Constructors v. Patterson, 48 So.2d 480 (Miss. 1950).

[10]212 Miss. 370, 54 So.2d 541 (1951); 25 Miss. L.J. 70 (1953).

that a person badly mutilated and disfigured by scars in the region of the face and head has suffered a severe damage, especially in cases of persons who appear before the public, such as lawyers, teachers, actors, professors, or ministers. This would also be an item of serious damage to an attractive young lady, who was hopeful of and contemplating marriage in the forseeable future. The Supreme Court of Louisiana commented on the fact that a girl's chances of marriage may be materially reduced by disfigurement and that such should be considered by the jury in assessing her damages.[11] The Louisiana court said:

> "In selecting a mate, a man is primarily influenced by outward and visible forms of beauty, whatever may be said of his appreciation of inward grace and the more lasting beauty of the spirit. His attention is first arrested and his interest stimulated by the contemplation of superficial attractions, the charm of more substantial virtues being realized only after better acquaintance. It is idle to deny that plaintiff's daughter, with a scarred face and glass eye, will be at a matrimonial disadvantage, and though she may, (as we trust she shall) eventually consummate a happy marriage to some worthy and appreciative husband, her opportunities for doing so have been materially affected as a result of her unfortunate accident."

Trial Procedure

In trying a case involving personal injuries, the plaintiff's attorney should be extremely careful to present all possible evidence to show the total amount of the damages. For example, he should have photographs of a damaged car to show the damage to it and the severity of the collision. He should have photographs of the injured person to submit to the jury, and particularly colored photographs where they will aid in showing a true picture of the injury. If the injured person had to wear a large, painful cast for a long period of time, it should be saved and used in the trial.

Pictures and Sound Recordings

The writer tried a case in the Circuit Court of Hinds County about two years ago in which the person injured was required to wear several large casts extending from her neck to her ankles; during the course of the trial these casts, which were four or five feet long, were shown to the jury. Also in the courtroom was an apparatus made of wood, which had been placed over her bed while she was in the hospital. From this apparatus hung chains so that she could exercise herself during the time she was unable to get out of bed. Other exhibits included photographs made of her in the hospital bed, one made showing an open reduction

[11]Teissier v. Stewart, 11 La. App. 164, 121 So. 777 (1929).

operation which the doctor performed on her leg, and photographs showing her in bed at home. Most courts hold that the fact that pictures *might* be gruesome does not affect their admissibility if they portray the true facts of the patient and his injury.[12]

In *Metropolitan Life Insurance Co. v. Wright*[13] the court held that motion pictures showing a claimant working should have been admitted in evidence to the jury to show whether or not he was disabled at particular times.

In *Ray v. State*[14] it was held that a tape recording of the defendant's confession should be admitted in evidence, the court saying that the wire recording of the defendant's voice would be of much more value to the court and jury than a confession taken down in shorthand and later reduced to writing.

The writer submits that in tort cases, recordings of a plaintiff's pain and suffering should be admitted in evidence to show the true nature and the severity of the suffering. For example, it has been held in Michigan that it was proper to permit a phonograph to be operated in the presence of the jury to reproduce sounds claimed to have been made by the operation of trains close to the defendant's hotel, where proper proof was made that the instrument gave an accurate and trustworthy reproduction of the sounds actually made and testified to.[15] In the hotel room a phonograph record had been made of the noise caused by trains running in that vicinity; the phonograph record was introduced to show the extent of damages caused by the laying of railroad tracks opposite the hotel.

In New York, damages and injunction were sought for sounds coming from the defendant's plant, which was operated at night, it being alleged that it made the plaintiff nervous and disturbed his sleep.[16] During the trial, the plaintiff offered in evidence a wire recording which had been made in his bedroom one night at 2:00 A.M. The owner of the machine testified that he made the recording for the plaintiff, that it had been in his possession since that time, and that the recording was a true reproduction of the sound. The court held this evidence admissible to show the character of the sound.

In proving damages, it is a general rule that non-expert witnesses may testify that a plaintiff suffered pain and made expressions of pain

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[12]Lynch v. Baldwin, 117 S.W.2d 273 (Mo. 1938); Godvig v. Lopez, 185 Ore. 301, 202 P.2d 935 (1949).

[13]190 Miss. 53, 199 So. 289 (1940).

[14]213 Miss. 650, 57 So.2d 469 (1952).

[15]Boyne City G. & A. Ry. v. Anderson, 146 Mich. 328, 109 N.W. 429 (1906).

[16]Frank v. Cossitt Cement Products, Inc., 197 Misc. 670, 97 N.Y.Supp.2d 337 (1950).

in their presence.[17] If you represent a person who has suffered a long time with serious personal injuries, you should put on the witness stand members of his family or others who have heard him make expressions of pain and suffering during his convalescense. It is, of course, necessary to show the amount of medical expense a person has sustained, how much he suffered, how much time he lost, and whether or not his injuries are permanent.

With reference to pain and suffering, the courts seem to be in accord in holding that there can be no exact standard by which to determine the amount of damages for pain and suffering. In *Biedenharn Candy Co. v. Moore*[18] the court said:

> "There is no exact standard by which to determine the amount of damages to be awarded for pain and suffering, the only standard therefor being what a reasonable man would consider as fair compensation therefor—what the jury, as reasonable men, so consider, and a jury's verdict so determining will not be disturbed unless it evidences passion, prejudice or corruption."

And, in *Sears, Roebuck & Co. v. Burke*[19] it was further stated:

> "The fixing of an amount of damages to be awarded in cases of this nature is one of the functions of a jury, composed of men from all walks of life—the butcher, the baker, the candlestick maker —and we are not authorized to invade the province of the jury unless the verdict is so excessive as to manifest such bias and prejudice that their determination is shocking to the conscience."

Death Cases

With reference to the death of a child, the elements of damages are set out in *Gordon v. Lee*,[20] and *Louisville & N. R.R. v. Whisenant*,[21] the elements being pain and suffering from injuries until death, loss of companionship and society, value of services of the child from its death to its majority and such gratuities as the parents had a reasonable expectation of receiving before or after majority of the child and the value of the life.

Generally, the items of damages for the loss of a husband are loss of companionship and society, loss of support, medical and funeral ex-

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[17]Louisville & N. Ry. v. Parker, 223 Ala. 626, 138 So. 231 (1931), *cert. denied*, 287 U.S. 569 (1932); Birmingham Ry. Light & Power Co. v. Jung, 161 Ala. 461, 49 So. 434 (1909); Southern Ry. v. Hobbs, 151 Ala. 335, 43 So. 844 (1907).

[18]184 Miss. 721, 186 So. 628 (1929); See also Kincade & Lofton v. Stephens, 50 So.2d 587 (Miss. 1951).

[19]208 Miss. 306, 44 So.2d 448 (1950).

[20]208 Miss. 21, 43 So.2d 665 (1949).

[21]214 Miss. 421, 58 So.2d 908 (1952).

penses, and pain and suffering of the deceased.[22] The damages for the loss of a mother would be the same except where she was not employed there would be no consideration of loss of support. The same would be true in the case of death of a child who was not rendering any support. In some cases, the damages in a death are not as great as in a severe personal injury, because there are no surviving dependent relatives and there would be no damage for loss of support, society and companionship.

Lawyers should be very careful in framing their instructions on damages. Furthermore, the writer believes that it is better to have as few instructions as possible in any case and believes that in a personal injury or death case, there should be only one instruction on liability, one on damages and one on the form of the verdict.

Proof of Damages

Plaintiffs' lawyers should be more diligent in the presentation of their cases in proving damages to the jury, whether it be a personal injury or a death claim. For example, in a case involving a man who is seriously injured, you know that he has lost so much time up to the time of the trial and that he will probably lose so many years from work in the future. You should break this down into the number of days and years he will be disabled and write it on a blackboard so a jury can see it.[23] If a person has endured intense pain and suffering for several months, this should be broken down in hours and minutes to impress upon the jury the length of time that the plaintiff has suffered. In proper cases, you should always use the mortality tables to show the life expectancy of a person so that you can prove the number of years and days he will lose his earning power and mutiply that by the amount of his weekly or daily wages. The same is true with reference to proving loss of companionship in the death of a loved one.

When the question is raised as to what is the value of a life or what is the value of a serious personal injury, it should be kept in mind that many material objects sell for fabulous prices. For example, some oil paintings sell for as much as $200,000 or $300,000. A bull in Mississippi recently sold for $40,000. Expensive pieces of jewelry sell for many thousands of dollars. One might say that these are objects of property, but by the same token, a person's body and right to live are property

[22]Damages for the death of a wife are considered in Gill v. Eakin, 203 Miss. 204, 33 So.2d 821 (1948). For other cases involving death of wife, see Ulmer v. Pistole, 115 Miss. 485, 76 So. 522 (1917) and Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So.2d 436 (1950). The latter case comments on the fact that household services performed by a wife are important and valuable. As to the death of a husband, see Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).

[23]As a matter of fact, every Circuit Court in Mississippi should provide a permanent blackboard in the courtroom. The jury is entitled to know all the facts in a case and to have them explained thoroughly.

rights and certainly should be more valuable to him than a painting or piece of jewelry. In the final analysis, the only reason that any of these things has any value is because someone is willing to pay *the asking price for them.* Therefore, when a jury says that a person's life or injury is worth a certain amount of money, the jury is merely saying that in their opinion, they believe the value of that life or injury is worth the amount of the verdict they return, and the writer submits that in a proper case the appellate court should be reluctant to disturb the findings of a jury composed of men from different walks of life.[24]

Punitive Damages

Mississippi recognizes that in proper cases punitive damages should be awarded in addition to compensatory damages, and such will be allowed in personal injury cases[25] and also in death cases.[26]

In *Teche Lines, Inc. v. Pope*[27] the court said that punitive damages are allowed where the negligence of the defendant is gross or such that it evidences a reckless disregard for the rights of others, and would not interfere with a verdict of which half or more represented a punitory award.[28]

Punitive damages are allowed, not to compensate the plaintiff, but to punish the defendant so that the interest of society may be regarded and the punitive damages awarded will operate as an example to deter others from similar acts in the future.[29] It is well to keep in mind that where punitive damages are proper, the financial worth of the defendant or defendants may be shown. This is true whether or not you have one

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[24]In the following death cases adequate verdicts were rendered: Family of a businessman who had been earning $9000 annually was awarded $300,000, DeVito v. United Air Lines, 18 F.Supp. 88 (N.Y. 1951); electrocuted crane operator's family given $165,000, Pike v. Consolidated Edison Co., 303 N.Y. 1, 99 N.E.2d 885 (1951); widow and two children were awarded $115,000 for damages including ten hours' pain preceding death, Naylor v. Isthmian S.S. Co., 187 F.2d 538 (2nd Cir. 1951); widow and three children of a railroad conductor awarded $100,000, Smith v. Penn. Ry., 99 N.E.2d 501 (Ohio App. 1950); family of a thirty-five year old Army sergeant received $100,000, Gall v. Union Ice Co., 108 Cal. App.2d 303, 239 P.2d 48 (1951). In the following injury cases adequate verdicts were rendered: For crushed pelvis, $260,000, Florida Power & Light Co. v. Watson, 50 So.2d 543 (Fla. 1951); for loss of sight to a plumber, $250,000, Kieffer v. Blue Seal Chemical Co., 196 F.2d 614 (3rd Cir. 1952); for loss of both legs, fracture of breastbone and back injuries, $185,000, Smith v. Illinois Central R.R., 343 Ill. App. 593, 99 N.E.2d 717 (1951); for the loss of a four year old infant's arms, $160,000, Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948).

[25]Teche Lines, Inc. v. Pope, 175 Miss. 393, 166 So. 539 (1936).

[26]Illinois Central R.R. v. Fuller, 106 Miss. 65, 63 So. 265 (1913).

[27]See note 25 *supra.*

[28]In Tri-State Transport Co. v. Worley, 197 Miss. 663, 20 So.2d 477 (1945), the court said that even where the punitive damages are twice the actual damages, the court would not interfere. In 1930, the Supreme Court, in Illinois Central R.R. v. Ramsay, 157 Miss. 83, 127 So. 725 (1930), allowed punitive damages in the amount of approximately 133 to 1 for a plaintiff who recovered $1.50 actual damages and $200 punitive damages for being taken past her destination while a passenger on defendant's train.

[29]Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373, *suggestion of error overruled,* 154 Miss. 359, 122 So. 756 (1929).

defendant or joint defendants, because the amount of damage awarded against one defendant who is wealthy would not be punishment to him, whereas it would be to a man in moderate circumstances.[30]

Conclusions

In some states, the amount of damages recoverable for a death is limited by statute. In Alaska, Illinois, Indiana, Kansas, Oregon, and Virginia the limit is $15,000. In Colorado and West Virginia the limit is $10,000. Mississippi, among other states, has no limit on recovery in death claims. Insurance companies do not hesitate to insure lives for $50,000, $100,000, $500,000 and upward. If the insurance companies place that value on a life, why should not a jury do so? Many people buy accident policies whereby they are paid $500 to $1000 per month benefit payments for life, if necessary. Why should not a jury award a person, if the circumstances warrant, an amount equivalent to $500 a month for life if he had been earning that much? The writer respectfully submits that perhaps such awards could be more often obtained if lawyers handling personal injury litigation would investigate their cases thoroughly and would carefully present all the facts and details to the courts and juries.

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[30]Interstate v. Garnett, *supra* note 29.

THE MISSISSIPPI COUNTERCLAIM STATUTE †

*Joe H. Daniel**

The Mississippi Legislature in 1952 enacted a law permitting the filing of counterclaims in certain types of cases, for the stated purpose of avoiding a multiplicity of suits.[1]

Cross-bills in chancery are provided for by statute,[2] and they have filled a vital need in equity practice over the years.[3] Set-off has been allowed by statute[4] for many years, but its use has been limited to those cases in which a mutual indebtedness existed.[5] It was unavailable in tort cases, or in any case where unliquidated damages were asserted defensively.[6] Recoupment, recognized at common law in this state, was defensive only, and could not be used to recover over against the plaintiff;[7] indeed, in tort claims it was of no more efficacy than a general issue plea.[8]

The state of procedural affairs was such that in virtually every case where each of two persons asserted a claim against the other, two separate suits were required to adjust their differences. This was true, even though the respective claims arose out of the same contract, transaction, or occurrence. The growing use of automobiles, with the accidents which have inevitably followed, has focused public attention on this procedural crisis. The unsatisfactory requirement of separate suits to settle these differences was noted in *Moore v. Abdalla*.[9] There an action was filed by the plaintiff for damages to his automobile sustained in an intersection accident with the defendant's automobile, and the latter sought to interpose a counterclaim for his own damages. The court sustained a motion to strike the counterclaim, in the following language:

> "Although many progressive members of our Bar think it ought to be otherwise, there is no provision in our law for a counter-

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†From an address delivered at the Eighth Annual Mississippi Law Institute on December 11, 1953, in Jackson, Mississippi.

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[1]Miss. Code § 1483.5 (1942).

[2]Miss. Code § 1296 (1942).

[3]Griffith, Mississippi Chancery Practice §§ 375-387 (2d ed. 1950).

[4]Miss. Code §§ 1481, 1482 (1942).

[5]Vines v. Perry, 208 Miss. 869, 45 So.2d 734 (1950); Moore v. Abdalla, 197 Miss. 125, 19 So.2d 502 (1944); Lancaster v. Jordan Auto Co., 185 Miss. 530, 187 So. 535 (1939).

[6]*Ibid.*

[7]Hoover Commercial Co. v. Humphrey, 107 Miss. 810, 66 So. 214 (1914); Amory Independent Telephone Co. v. Cox, 103 Miss. 541, 60 So. 641 (1913); Hayes v. Slidell Liquor Co., 90 Miss. 583, 55 So. 356 (1911); Myers v. Estell, 47 Miss. 4 (1872).

[8]Moore v. Abdalla, 197 Miss. 125, 19 So.2d 502 (1944).

[9]*Ibid.*

claim in an action in tort, even when the counterclaim grows out of the same occurrence; . . ."

Following this decision, editorial comment was directed toward the unavailability of counterclaims in tort actions. Senator John C. Stennis, then a Circuit Judge, discussed the lack of counterclaim procedure as follows:

> "A striking defect in our procedural law is illustrated in *Moore v. Abdalla*. . . . But the only way of asserting his own claim affirmatively would be to file a new suit, thus causing the jurors, the judge, the witnesses, the court officers and the attorneys to consume another day, or a part thereof, at the expense of the litigants and taxpayers and with inconvenience and delay to all. So long as trial courts are forced to operate under such backward rules, thus forcing jurors and witnesses to leave their homes and spend time in such useless repetitions, these forums cannot long retain the wholesome respect of the people. . . ."[10]

It was for the purpose of correcting this obvious defect in procedure that our legislature adopted the counterclaim statute. It has not yet been interpreted by the Mississippi Supreme Court, and rules governing its use must be determined by a comparison with the laws and decisions of other states. The purpose of this article is to examine some of them.

Mississippi Counterclaim Statute Compared with Those of Other States

Virtually every state in the union now has some provision, construed with more or less liberality, for the presentation of counterclaims in actions at law. The Federal Rules of Civil Procedure[11] contain the most liberal counterclaim provision, and at least one state has adopted the Federal Rules of Civil Procedure *verbatim*.[12] Some states provide for the joinder of new parties on the counterclaim,[13] while others provide for the use of counterclaim (or crossclaims) between codefendants.[14] The Mississippi statute has no provision for obtaining jurisdiction of persons other than those in the original action, and it is unlikely that the courts will construe it to provide for "third party" practice. The causes of action which may be presented as counterclaims, however, appear to be more numerous in the Mississippi counterclaim statute than in those of most other states.

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[10]Stennis, *Pleading, Practice and Procedure,* 18 MISS. L.J. 63 (1946).
[11]FED. R. CIV. P. 13.
[12]ARIZ. CODE §§ 21-437, 21-438 (1939).
[13]ARK. STAT. § 27-1124 (1947); CONN. STAT. § 7832 (1949); FLA. STAT. § 52.11.
[14]WIS. STAT. § 2656A; Liebhauser v. Milwaukee Electric Railway and Light Co., 180 Wis. 468, 193 N.W. 522 (1923); See Note, 43 A.L.R. 870 (1926).

Perhaps the most typical statute in general use is one which provides for counterclaims based on:

> ". . . a cause of action arising out of the *contract* or *transaction* set forth in the complaint as the foundation of the plantiff's claim, or connected with the subject of the action. . . ."[15]

The Mississippi statute covers not only the "transaction or contract upon which the plaintiff's action is based," but also the "situation, occasion, . . . or subject matter." The first problem presented, therefore, is the scope of these terms, since the counterclaim, to be properly presented for adjudication, must fall within them.

Situation, Occasion, Transaction, or Contract or Subject Matter

"Contract" is a term which is fairly well defined in the various cases, including our own cases on set-off and recoupment; "transaction," however, is one with which there has been controversy in definition in various states. It is generally held that " 'transaction' embraces more than the word 'contract' and a transaction may be a tort. It is an occurrence."[16]

Those states which permit maximum use of counterclaims do so by giving a broad definition of "transaction." Thus, it has been held that:

> "the cause of action arises from the transaction set forth in the complaint when the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect result in plaintiff's right of action, and, when viewed in another aspect result favorably to the defendant."[17]

Another court has approved Webster's definition of "transaction" as "that which is done," or, "the affair." It held that:

> ". . . any primary right of the defendant which is violated in 'that which is done,' or 'the affair' set forth in the plaintiff's petition or connected with it, is, if we give the ordinary meaning to the words of the statute, a proper matter of counterclaim."[18]

California has extended the meaning of the term "transaction" to include all causes of action arising out of an automobile accident.[19]

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[15]S.C. CODE § 468 (1942).

[16]Benton County Bank v. Nichols, 153 Ore. 173, 54 P.2d 1166 (1936).

[17]Mulcahy v. Duggan, 67 Mont. 9, 214 P. 1106 (1923); Warren v. DeLong, 59 Nev. 481, 97 P.2d 792 (1940); Wrege v. Jones, 13 N.D. 267, 100 N.W. 705 (1904); POMEROY, CODE REMEDIES § 650 (5th ed. 1929).

[18]Howe v. Struble, 90 Ohio App. 172, 104 N.E.2d 197 (1951).

[19]Shrader v. Neville, 34 Cal. App. 112, 207 P.2d 1057 (1949); Gorman v. Superior Court, 23 Cal. App. 173, 72 P.2d 774 (1937).

Perhaps the broader trend of the decisions may be best illustrated by an Oklahoma case,[20] in which the court held that:

> ". . . while the courts have not arrived at a wholly satisfactory definition of the term 'transaction,' . . . it is quite generally agreed that is is broader in meaning than the word 'contract,' and includes torts; otherwise it would not have been employed. . . . Therefore any cause of action, whatever its nature, arising out of the cause of action alleged in the petition or connected therewith, in favor of the defendant and against plaintiff, is a proper counterclaim."

Since the terms "situation" and "occasion" have not been used in the statutes of most other states, any attempt to define their meaning would be to little avail. Suffice it to say that the fact that these terms have been used indicates a desire on the part of the legislature to permit the use of counterclaims, even where the subject thereof may not fall within the "contract or transaction," and thereby provide for the broader use of counterclaim in this state.

Examples

Action on Contract, with a Counterclaim on Contract. There is need for but a cursory examination of authorities to support the propriety of a counterclaim based on violation of a contractual right, where the original action is based on some right arising out of the same contract. Since set-off and recoupment have been used in Mississippi for years, it would appear that the right of a defendant to establish his counterclaim and recover over on appropriate proof is without question. Difficulty may be present where the action is based on a right arising out of a separate contract. The Mississippi cases dealing with set-off and recoupment are sufficient authority on the general proposition, without the need of elaboration or discussion in this article.

Action on Contract, with a Counterclaim in Tort. It is in this class of cases that the principal problems appear. As already indicated, court after court has so broadened the definition of "transaction" as to include torts. The question generally arises in suits on open accounts, suits for collection of rents, and similar actions. Some courts categorically refuse to recognize tort counterclaims in contract actions. For example, it has been held that counterclaims for malicious prosecution,[21] slander,[22] and trover and conversion,[23] could not be presented in actions on open account. Other courts establish such limited concepts of "transaction" that counterclaims in tort are generally not recognized in

[20]Guy Harris Buick Co. v. Bryant, 108 Okla. 117, 233 P. 752 (1925).
[21]Jacksonville Paper Co. v. Owen, 198 Ga. 23, 17 S.E.2d 76 (1941).
[22]Yelton v. Bird Lime and Cement Co., 161 S.W.2d 353 (Texas 1942).
[23]Schwartz and Nagle, Inc. v. Langer Transport Co., 130 N.J.L. 562, 33 A.2d 907 (1943).

actions on contract. For example: a counterclaim based on a slanderous credit report was not permitted in an action to recover for merchandise sold and delivered;[24] a counterclaim based on slander was not permitted in an action on a note;[25] a counterclaim charging oppressive handling of litigation was held not to arise out of a suit on the appeal bond put up by the defendants.[26]

Other states, recognizing the policy of adjudicating controversies in one action, have so broadened the definition of "contract or transaction" to include almost any tort counterclaim presented in any contract action. In this category, it has been held that a counterclaim based on slander could be filed in a legal action to rescind a life insurance contract;[27] that a counterclaim for conversion of stock could be adjudicated in an action on a note given in payment for the stock;[28] that a counterclaim for fraud and misrepresentation inducing the defendant to buy stock could be presented in an action to collect a note given to pay for the stock;[29] that a counterclaim for negligently permitting fire to destroy defendant's building was properly presented in an action by the tenant to obtain reimbursement for rent paid in advance for use of the building;[30] fraud and misrepresentation inducing the contract sued on may be made the basis of a counterclaim in the plaintiff's action to enforce the provisions of the contract.[31]

It is obvious that there is no single rule which can be used to resolve these conflicts. Some attempt has been made to determine whether time element is of assistance in determining the propriety of a counterclaim, and yet the cases fail to establish the time element as an adequate test. A slander committed many months after the issuance of a life insurance policy was permitted to be presented as a counterclaim in an action to cancel the policy.[32] A counterclaim for the unlawful appointment of a receiver for the defendant's business was permitted in an action to recover possession of incubators, even though the appointment occurred months after the sale.[33] One state[34] has attempted to determine the propriety of the counterclaim on the basis of forseeability.

Without predicting that such may be the case, some assistance may

[24]Weiner v. Equel's Style Shop, Inc., 210 N.C. 705, 188 S.E. 331 (1936); Price v. Kobacker Furniture Co., 20 Ohio App. 464, 152 N.E. 301 (1925).

[25]Coastal Produce Association v. Wilson, 193 S.C. 339, 8 S.E.2d 505 (1940). The court held that the slander was not attributable to anything contained in the contract sued on.

[26]Renneker v. Rehkopf, 208 S.C. 72, 37 S.E.2d 138 (1946).

[27]Aetna Life Insurance Company v. Lourie, 201 S.C. 478, 23 S.E.2d 741 (1942).

[28]Exchange Bank of Meggett v. Bennett, 193 S.C. 320, 8 S.E.2d 515 (1940).

[29]See note 16 *supra*.

[30]Salina Coca-Cola Bottling Co. v. Rogers, 171 Kan. 688, 237 P.2d 218 (1951).

[31]Arctic Roofings v. Travers, 3 Del. 293, 32 A.2d 559 (1943).

[32]See note 27 *supra*.

[33]Petersime Incubator Co. v. Ferguson, 143 Kan. 151, 53 P.2d 505 (1936).

[34]See note 25 *supra*.

be found in the Mississippi cases dealing with the problem of whether a cross-bill in equity is germane to the bill of complaint.[35]

Action in Tort, Counterclaim on Contract. There can be no logical distinction between cases where the action is on contract, with a counterclaim in tort, and those in which the order of presentation is reversed. The counterclaim must still find its foundation in the "situation, occasion, transaction or contract or subject matter upon which the plaintiff's action is based." The principal difference is that a far greater number of cases are found to illustrate the former than the latter. The courts of some states categorically refuse to permit contract and tort claims and counterclaims to be adjudicated in the same action. For example, where a complaint based on conversion of notes and a mortgage was presented, the court refused to entertain a counterclaim for collection of the balance due on the note, holding that the claim and counterclaim "were not of a similar nature, one being in tort and the other in contract."[36] In another case, an action was filed in tort for the conversion of funds, and the defendant counterclaimed on allegations that money theretofore borrowed by him from the plaintiff was loaned at usurious rates, for which he demanded a recovery of double interest. The court held that the plaintiff's action was in tort, the defendant's counterclaim was on contract, and that the latter did not arise out of the transaction sued on.[37]

If counterclaims based on contract are not permitted in actions in tort, a plaintiff would have the opportunity to defeat the adjudication of a counterclaim. A plaintiff often has an election to sue either on contract or in tort, and his right so to do should not be the factor which determines the propriety of the counterclaim.[38]

Right and justice require an examination of the claim and counterclaim in the light of their relationship each to the other, and to the meaning of "situation, occasion, transaction or contract or subject matter," instead of an arbitrary refusal to recognize contract counterclaims in tort action.

Action in Tort, with a Counterclaim in Tort. The new statute will find its most novel applications in cases in which conflicting tort claims are presented by claim and counterclaim. It will also find application to assaults and similar torts. It has already been noted that some states hold that all causes of action arising out of an automobile accident are a part of the same transaction.[39] Under the Mississippi statute,

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[35]Griffith, *op. cit. supra* note 3, §§ 379, 381.
[36]Powers v. Wren, 198 Ga. 316, 31 S.E.2d 713 (1944).
[37]Commercial Finance Co. v. Holder, 235 N.C. 96, 68 S.E.2d 794 (1952).
[38]Brady v. Brennan, 25 Minn. 210 (1878); Gordon v. Brunner, 49 Mo. 570 (1872); Thompson v. Kessel, 30 N.Y. 383 (1864).
[39]Cases cited note 19 *supra*.

rights accruing from automobile collisions may not only be construed to arise out of the same "transaction" but also the same "situation" or "occasion." In other tort claims, such as assault, libel, slander, malicious prosecution, and the like, the determination of the question may be more difficult.

The leading case dealing with conflicting claims and counterclaims for torts occurring at the same time is *Brown v. Patterson*,[40] where the rights of two parties involved in a street fight were resolved in one action, under the Alabama recoupment decisions. Each party contended that the other was the cause of the fight. The court recognized the public policy of avoiding a multiplicity of suits, and held that the conflicting contentions of the plaintiff and the defendant should be resolved in one action, since the Alabama procedure permitted a recovery over by the defendant, if such was the judgment of the court.

It would certainly appear that Mississippi would reach a conclusion in accord with *Brown v. Patterson*, were the problem presented under the new counterclaim statute. Where, however, the time element is not as clear as in the cited case, the answer likewise is not as clear. Many such occurrences have their foundation in feuds running for days, months or even years, with each party contending that the other is at fault. It has been held that a counterclaim for a libel was properly presented in an action for assault, even though the libel occurred a week earlier than the assault.[41] Going even further, a counterclaim for *continuing* assaults, trespasses and harassment covering a two year period has been permitted in an action predicated on assault.[42]

The time element and the dissimilarity of evidence required for the claim and counterclaim have been held to prevent the adjudication of a counterclaim in the plaintiff's action. A plaintiff sued for an assault, and the defendant counterclaimed for damages done by the plaintiff to the dam owned by the defendant a few days earlier; the court refused to entertain the claim and counterclaim in one action, even though the defendant contended that the assault was brought about by the plaintiff's destruction of the dam.[43] In the same line, a counterclaim for conversion of funds by the plaintiff was held improper in the plaintiff's action for assault and battery and malicious prosecution.[44]

Those states which reject the counterclaims in such circumstances do so on the ground that independent torts cannot arise out of the same transaction.[45] In one case the court held that "transaction" is not broad

[40]214 Ala. 351, 108 So. 16 (1926); See Note, 47 A.L.R. 1093 (1927).
[41]Mulcahy v. Duggan, 67 Mont. 9, 214 P. 1106 (1923).
[42]See note 18 *supra*.
[43]Longpre v. Schmele, 64 S.D. 70, 264 N.W. 201 (1935).
[44]Anderson v. Snell, 57 Nev. 78, 62 P.2d 703 (1936).
[45]Lake Shore & M. S. Ry. v. Van Auken, 1 Ind. App. 492, 27 N.E. 119 (1891).

enough to include independent torts, and is not synonymous with "occurrence" or "accident." (Compare this with the language of the Mississippi statute.) The reasoning was that if each party were separately negligent, the claim and counterclaim did not arise out of the same transaction.

Such reasoning may well destroy the efficacy of the counterclaim statute. Suppose that A and B collide at an intersection. A charges that B failed to yield the right-of-way, and B charges that A failed to maintain a lookout, and failed to have his automobile under reasonable and easy control. The negligence of each is separate, yet the acts and omissions combined to produce injuries and damages. Surely it was the purpose of the legislature to permit the adjudication of such conflicting claims in one action.[46]

Although tests are difficult to state in such matters, it appears that the definitions set forth earlier in this article will assist in obtaining substantial justice between the parties, which is, after all, the only reason for the existence of the counterclaim statute.

Counterclaims as Applied to Possessory Actions. Replevin is purely a statutory procedure in Mississippi.[47] It is said to be ex delicto and not ex contractu.[48] Sections of the Code provide for the affidavit, the venue, the writ, the officers' return, bonding of the property, contents and nature of the judgments that can be rendered, the pleadings, claims by third persons, and related matters. Of particular interest is the section dealing with "the pleadings,"[49] wherein the "not guilty" plea is required. It has been held that a "not guilty" plea is the only one permitted in replevin action,[50] and that any other plea may be striken on motion or treated as a nullity.[51]

Since replevin deals primarily with the possession of property, and only incidentally, if at all, with damages, the right to present counterclaims in such actions has been the subject of much debate. It is difficult to predict what course the Mississippi courts may take.

There is substantial authority for the position that counterclaims, set-off and recoupment are not available in replevin actions, since the sole issue presented is the right to the possession of certain property. Perhaps the case most clearly presenting this view is *Woodley v. Buben-*

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[46]Grevenstuk v. Hubeny, 216 Ind. 379, 24 N.E.2d 924 (1940).
[47]Miss. Code §§ 2841-2869 (1942).
[48]Garmon v. Fitzgerald, 168 Miss. 532, 151 So. 726 (1934).
[49]Miss. Code § 2859 (1942).
[50]General Motors Acceptance Corp. v. Shumake, 192 Miss. 446, 6 So.2d 309 (1942); Wells v. Bullock, 192 Miss. 347, 5 So.2d 686 (1942); Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 So. 856 (1922); Nunn v. Potter, 111 Miss. 180, 71 So. 315 (1916).
[51]Bennett v. Holloway, 55 Miss. 211 (1877).

dorf,[52] where the plaintiff filed an action in replevin, to which the defendant filed a counterclaim for storage rentals and personal services. The court reviewed the laws on counterclaims, statutory replevin, and forms of verdicts, and concluded that a counterclaim could not be filed in a replevin action. The court held that justice was better served by separate actions, since the two remedies sought—possession of property on the one hand, and money on the other—were inconsistent and that no judgment of the court could reconcile them.

The rule thus announced is approved in other jurisdictions, where the primary action seeks possession alone.[53] Where, however, the action is in form a replevin action, but is in reality an attempt to collect a debt, the authorities often permit the counterclaim.[54] What principles should be applied to determine whether the real intent of the plaintiff is to obtain possession of property or to collect a debt was not learned in the research for preparation of this article.

Other states permit the filing of counterclaims in replevin actions, provided that the counterclaim "arises out of the contract or transaction" forming the foundation of the plaintiff's cause of action,[55] as discussed earlier. These cases follow the modern practice of adjudicating conflicting contentions in one case, if connected sufficiently therewith. There is also authority for the proposition that the counterclaim must tend to defeat the plaintiff's right to recover the property or defeat or diminish the amount of damages claimed for its detention, for the counterclaim to be adjudicated in a replevin action.[56]

Some states have solved the dilemma by specific statutory provisions permitting the use of counterclaims in possessory actions; typical of these is the Georgia statute.[57] To properly adjust the rights of the parties, the statute permits the plaintiff to take the property if he prevails, but imposes a lien thereon for the amount of damages awarded on the counterclaim.

It appears that some expression on this point by the Mississippi Legislature would have been appropriate, in the light of the conflicts in the authorities, and in view of the procedural problems noted below.

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[52]69 F.Supp. 593 (D.C. Alaska 1947).

[53]Mason v. General Machinery & Supply Co., 91 Col. 69, 11 P.2d 802 (1932).

[54]*Compare* Brunswick-Balke-Collender Co. v. Culbertson, 178 Ark. 957, 12 S.W.2d 903 (1929), *with* Mills Novelty Co. v. Millsaps, 173 Ark. 1136, 294 S.W. 69 (1927).

[55]Jacksonville Paper Co. v. Smith and Winchester Mfg. Co., 147 Fla. 311, 2 So.2d 890 (1941); General Refrigeration Sales Co. v. Roberts 145 Kan. 333, 65 P.2d 269 (1937); W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N.W. 307 (1914).

[56]Riss & Co., Inc. v. Wallace, 350 Mo. 1208, 171 S.W.2d 641 (1943); See Note, 151 A.L.R. 512 (1944).

[57]GA. CODE § 107-102 permits counterclaims in possessory actions " . . . for any demand or claim that he may have against the plaintiff, or may recoup any damages that he has sustained by reason of any failure of consideration, or any defects in such personal property, or any breach of contract by the plaintiff . . . . "

In one Mississippi case, a counterclaim for money paid on the purchase price of a gasoline engine was filed in the plaintiff's replevin action to recover possession of the engine. The court dismissed the "counterclaim" for the money so paid and held that:

> " . . . the only judgments for the recovery of money that can be rendered in an action of replevin are for the value of the property involved, or the interest therein of the party recovering for damages for the wrongful taking or detention of the property and for damages for the wrongful suing out of the writ . . . and a money judgment for the money paid the plaintiff on the engine is not within any of these classes."[58]

In attempting to guess what the Mississippi courts may do on this question, we have several factors which must be considered. First of all, replevin is covered in great detail by the statutes, lending credit to the argument that had the legislature intended to permit counterclaims in replevin actions, it surely would have provided more adequately for them. Secondly, as considered in *Woodley v. Bubendorf, supra,* the absence of special verdicts makes such matters difficult in handling before a jury. Thirdly, and least important, written instructions to the jury will be most awkward where both the plaintiff and the defendant seek possession of personal property as well as conflicting claims in damages. These problems make the handling of such counterclaims in replevin actions more cumbersome than helpful, and for that reason the courts may decline to permit the counterclaims.[59]

Identity of Parties in Claims and Counterclaims

The Mississippi counterclaim statute is silent on the availability of counterclaims in actions in which there is more than one plaintiff or more than one defendant. For example, if two defendants are sued, and one has a counterclaim, may the counterclaim be imposed in the same action? Conversely, if there are several plaintiffs and one or more defendants, may a defendant interpose a counterclaim against less than all of the plaintiffs? The statutes of other states vary substantially from the Mississippi counterclaim statute. In the absence of specific authority, however, a plaintiff is not required to stand idly by while the defendants scrap among themselves to determine their respective liabilities to the plaintiff or to each other.[60] Even where there is statutory authority for a defendant to counterclaim or cross-claim against a codefendant, the matters between the defendants must be found to involve the "transaction" which is the subject matter of the plaintiff's action.[61]

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[58]Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 So. 856 (1922).
[59]See note 56 *supra.*
[60]Fox v. Western New York Motor Lines Corp., 257 N.Y. 305, 178 N.E. 289 (1931); See Note, 78 A.L.R. 578 (1932).
[61]See note 14 *supra.*

If the other statutory requirements are met, one defendant who has a claim against a plaintiff may present his counterclaim for decision thereon in the same cause,[62] without regard to the interest of the other defendants therein, if any.[63] A similar rule would appear to apply where a defendant, or one of several defendants, has a counterclaim against the plaintiffs, or one or more of them.

Since the Mississippi counterclaim statute is silent on all of these problems, it is unlikely that the courts will construe it to provide for the joinder of any new parties or for multiple parties, plaintiff or defendant.

Questions will arise where parties appear in a representative or fiduciary capacity. Generally speaking, the courts, in determining the propriety of maintaining a counterclaim, will first ascertain who are the real parties in interest, and having done so, will decide whether the counterclaim arises out of the "transaction" which is the subject of the plaintiff's action. Examples may be found in cases where an administrator sues, or is sued, and recovery is sought for the wrongful death of a decedent under Lord Campbell's Act.[64]

Of course, claims by or against an estate must be examined in the light of statutes governing executors and administrators.[65] An action by an administrator shortly after his appointment as such would probably not support a counterclaim which was filed against him within six months after the issuance of letters.[66] Similarly, if the subject matter of the counterclaim against an estate is such that the courts would not have entertained it as an original suit, then the counterclaim would not be proper. For example, under Kansas probate procedure, the subject of the counterclaim against the estate of a deceased was such that it could be presented by probate only, and not by original action. The court held that it did not have jurisdiction of the counterclaim, since it could not have entertained the subject matter thereof in an original action against the administrator.[67]

The question will also arise under assigned causes of action[68] as to whether a counterclaim may be urged against the assignee. The question has been presented in subrogation claims arising out of automobile accidents, where the defendant contends that the accident was caused by the assignor's negligence, and the defendant seeks recovery of his dam-

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[62]Craft v. Craft, 209 Ala. 226, 95 So. 901 (1923).
[63]Depoyster Lumber Co. v. Commercial Lumber Co., 213 Ala. 327, 104 So. 798 (1925).
[64]Miss. Code § 1453 (1942).
[65]Miss. Code §§ 495-656 (1942).
[66]Miss. Code § 612 (1942); Matthews v. Redmond, 202 Miss. 253, 32 So.2d 123 (1947).
[67]Malcolm v. Larsen, 158 Kan. 423, 148 P.2d 291 (1944).
[68]Miss. Code §§ 1448-1450 (1942).

ages by counterclaim. It is generally held that no recovery over can be had against the assignee on a counterclaim, and the right of recovery over may be sought only against the assignor.[69]

Other examples concerning the identity of the parties may be considered, such as suits by or against partnerships or the members thereof, and the availability of counterclaims in such action. Corporate administrators, trustees, and guardians, while acting as such, may be faced with counterclaims against them in other capacities, which would probably be stricken on motion. Agents or servants, suing in their own rights, may be faced with counterclaims against the principal or employer. Suffice it to say that the court will assure itself that the claim or counterclaim is presented against the party in the same right in which he sues and, if such is not the case, the counterclaim will be stricken.

Jurisdictional Amount as Applied to Counterclaim

A counterclaim must be based on a cause of action of which the court in which it is filed would have had original jurisdiction. The jurisdiction of the Justice of the Peace Courts[70] and County Courts[71] is limited to claims not exceeding $200.00 and $3,000.00, respectively. Jurisdictional amount is determined by the amount claimed in good faith, at the time of filing suit. Problems arise when counterclaims in excess of these amounts are filed in the respective courts which have juridiction of the original claims.

If the amount sought by counterclaim is in excess of the jurisdiction of the court in which the original action is filed, the plaintiff may move to strike the counterclaim, and proceed on his own cause of action. The general rule is that the filing of a counterclaim in excess of the court's jurisdiction does not oust the court of jurisdiction to hear the plaintiff's claim, although it could not adjudicate the counterclaim.[72]

From the defendant's standpoint, and upon equitable grounds, such as the inadequacy of the remedy at law, he may enjoin the prosecution of the plaintiff's claim, and require the presentation of the conflicting claims in chancery.[73] Such a conclusion is based on the premise that complete justice cannot be done in the first action, since the counterclaim is above the jurisdition of the court, and that complete relief may be obtained only in an action in equity.[74] Obviously, the counterclaim statute has failed in its purpose in any such procedure.

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[69]Occidental Insurance Co. v. Herman, 179 Misc. 499, 38 N.Y.S.2d 278 (1942).
[70]Miss. Code § 1805 (1942).
[71]Miss. Code § 1604 (1942).
[72]Order of Railroad Conductors v. Gorman, 133 F.2d 273 (8th Cir. 1943); Nelson v. Meyer, 66 Col. 164, 180 P. 86 (1919); Am. Jur., Courts § 221.
[73]Dudley v. Whatley, 244 Ala. 508, 14 So.2d 141 (1943); See Note, 147 A.L.R. 508 (1943).
[74]Oatis v. Graham Paper Co., 188 Ga. 778, 4 S.E.2d 824 (1939); See Note, 125 A.L.R. 333 (1940).

Some courts proceed on the theory that each party shall file his claim in a court having original jurisdiction thereof, just as though a counterclaim procedure did not exist;[75] each party is protected in his right to choose his own forum.

Perhaps the answer most nearly in accord with the legislative purpose of the counterclaim statute is found in the provision of some states[76] for the transfer of a cause of action to a court having general jurisdiction of the counterclaim and the claim, if the counterclaim is in excess of the jurisdictional amount of the court in which the action is filed. It appears that specific statutory authority would be required in Mississippi for such a procedure.

In a few states, a defendant with a counterclaim in excess of the inferior court's jurisdiction is permitted to enlarge the counterclaim for damages on appeal to a higher court, on a trial de novo;[77] others refuse to allow the amendment, on the ground that the appellate court, even on a trial de novo, is exercising appellate rather than original jurisdiction.[78] Mississippi has declined to permit a counterclaim to be interposed on appeal to the Circuit Court for an amount larger than the original jurisdiction of a Justice of the Peace Court.[79]

Where the action is filed in a court of limited jurisdiction, against codefendants, and each has a counterclaim which, considered alone, is within the jurisdiction of the court, but when combined with the other counterclaim is above it, it has been held that the monetary limitation applies only to any one counterclaim, and not to the total of the combined counterclaims.[80]

The inability of the court in which the action is filed to adjudicate the counterclaim because it is in excess of its jurisdiction destroys the beneficial purpose of the statute, as does a proceeding in equity to enjoin the prosecution of the original claim. It appears that the procedure more nearly in accord with justice is one in which the court in which the action is originally filed may transfer the entire cause, both claim and counterclaim, to a court having general jurisdiction of both, which would, in practically all cases, be the Circuit Courts in Mississippi.

Effect of a Pending Action

Brief notice should be given to cases in which the two parties file

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[75]Moraldo v. Hendricks, 90 Ohio App. 436, 107 N.E.2d 159 (1951).

[76]Broad and Branford Place Corp. v. J. J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (1944).

[77]Hegman v. Roberts, 201 S.W. 268 (Tex. 1918).

[78]Stacy v. Mullins, 40 S.E.2d 265 (Va. 1946); See Note, 168 A.L.R. 636 (1947).

[79]James v. Williams Furniture Co., 161 Miss. 358, 137 So. 101 (1931); Crooke v. Deas & Duke, 146 Miss. 206, 111 So. 293 (1927); McLeod v. Gray, 4 So. 544 (Miss. 1888); Marx v. Trussell, 50 Miss. 498 (1874).

[80]Navarro v. Martin, 22 N.J. Misc. 291, 38 A.2d 691 (1944).

separate suits against each other. In a New York case,[81] each party sued the other after a collision. A motion was made to dismiss the suit last filed, since the prior action was pending. The court held that:

> "The motion is without merit. Action No. 1 is brought to recover the alleged damages to Mr. Tarbell. Action No. 2 is brought to recover the alleged damages to Howard. They grow out of the same accident or transaction, but they are not the same causes of action. True, Mr. Howard could have set up his claim as a counterclaim, but he was not obliged to do so . . . Had Howard 'voluntarily and unnecessarily pleaded' his cause of action as a counterclaim, the defense that another action was pending might have been good in a subsequent action brought by him . . . but not otherwise."

In an Illinois case,[82] plaintiff sued to recover payments due for advertising defendant's store; defendant counterclaimed for defamatory statements made by plaintiff. The defendant had already filed a suit for the same statements by plaintiff. The court dismissed the counterclaim, since it was already the subject of a pending action.

In a state where counterclaims are compulsory, one case[83] held that the suit in which process is first had shall be tried, and the defendant in that action is required to present his demands as a counterclaim therein.

Application of Statutes of Limitation

Statutes of Limitation are not applicable to matters of defense, but apply only where affirmative relief is sought.[84] The general rule is announced by statute in Mississippi.[85] This provision has been interpreted to permit a defendant to interpose his "demand," though barred, for the purpose of defeating the plaintiff's claim; he has not been permitted to use his demand offensively for a recovery over against the plaintiff.[86] Now that counterclaims are recognized by the Mississippi counterclaim statute, the question of the availability of a counterclaim, though barred by the Statute of Limitations, as an offensive weapon, will undoubtedly be presented for decision.[87] Whether the counterclaim statute will have the effect of broadening the "set-off" exempted from the Statute of Limitations remains to be seen. The availability of a counterclaim based on a tort on which the Statute of Limitations has expired presents an-

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[81]Tarbell v. Howard, 162 Misc. 606, 295 N.Y.S. 376 (1937).
[82]Fitzpatrick v. Blue Star Auto Stores, Inc., 312 Ill. App. 184, 37 N.E.2d 928 (1941).
[83]Gorman v. Superior Court, 23 Cal. App. 173, 72 P.2d 774 (1937).
[84]34 Am. Jur., Limitation of Actions § 63.
[85]Miss. Code § 747 (1942).
[86]Hardin v. Grenada Bank, 182 Miss. 609, 180 So. 805 (1938); Jones v. Brewer, 146 Miss. 142, 110 So. 115 (1926); Jordan v. Holmes & Herrick, 102 Miss. 487, 59 So. 809 (1912); Feld v. Coleman, 72 Miss. 545, 17 So. 378 (1895).
[87]See Note, 1 A.L.R.2d 632 (1948).

other unusual problem. In one case,[88] a counterclaim for conversion which was not barred at the time the plaintiff's suit was filed, but which was barred by the time the counterclaim was instituted, was permitted.

Counterclaim as Permissive or Mandatory; Application of Doctrine of Res Judicata

The Mississippi counterclaim statute provides that " . . . the defendant in his answer *may* plead a claim or demand against the plaintiff . . . "[89] In any consideration of this statute, it must be determined whether the statute shall be construed simply as *permitting* the filing of counterclaims, or as *requiring* their presentation. Interwoven with the problem is that of the doctrine of res judicata, since, if the statute be mandatory, the failure to present a counterclaim may bar a subsequent suit thereon. At the outset, it would appear that the Mississippi statute is permissive rather than mandatory, and that the defendant has an election to set up his counterclaim in the original cause of action, or to withhold it for prosecution in a special action brought for that purpose. Attorneys are familiar with the general rule that a judgment in a former suit is conclusive not only as to all matters actually pleaded, but as to all matters which could have been set up therein.[90]

Some states provide that the defendant must set up a counterclaim in the original cause of action, or be barred thereafter.[91] In other states, although the statute may be construed to be permissive, an estoppel may be pleaded against a plaintiff who had an opportunity to present a claim in a prior action, failed to do so, and then settled and compromised his liability.[92] In a statute providing that "a pleading shall state as a counterclaim any claim . . ." the court held that a party failing to set up by way of counterclaim in the original suit any related claims he may have against the opposite party, waives them and cannot later assert them.[93]

It appears first of all that the use of the word "may" is consistent with an election by the defendant to present his counterclaim in the plaintiff's action or reserve it for subsequent prosecution.[94] This conclusion is in line with what appears to be the general rule in such cases.

The Mississippi court, in *Cotton v. Walker*,[95] applied the doctrine

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[88]Tom Reed Gold Mines Co. v. Brady, 55 Ariz. 133, 99 P.2d 97 (1940); See Note, 127 A.L.R. 905 (1940).

[89]Miss. Code § 1483.5 (1942).

[90]Moses v. Weaver, 210 Miss. 228, 49 So.2d 235 (1950); Browne v. Merchants Co., 186 Miss. 430, 191 So. 120 (1939); National Life and Accident Insurance Co. v. Prather, 172 Miss. 567, 161 So. 117 (1935).

[91]Arizona, Arkansas, California, Idaho, Indiana, Montana, Nebraska, Ohio, Oklahoma and Utah.

[92]Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951).

[93]Mack v. Scott, 235 S.W.2d 106 (Mo. 1950).

[94]Conley v. Marshall, 304 Ky. 745, 202 S.W.2d 382 (1947).

[95]164 Miss. 208, 144 So. 45 (1932).

of res judicata in a subsequent case where the plaintiff in a prior action recovered exactly what he sued for, on the ground that the verdict and judgment in the first case for the full and exact amount sued for was an adjudication that the driver of his vehicle was guilty of no negligence which contributed to the accident. Although it will seldom happen that the plaintiff will recover the exact amount for which he sues, the principles announced in the case may be given broad application under the new Mississippi counterclaim statute.

Assume an automobile accident between cars driven by A and B. A sues for personal injuries, and B denies negligence on his part, and pleads that the negligence of A was the proximate cause, or at least a contributing cause. A recovers, after conflicting evidence on the trial. B then files a suit to recover for his own injuries, and sets up pleas of estoppel and res judicata. B used A's negligence as a defense in the first action, and now seeks to use it offensively in the second. B's claims against A could have been used to recover over in the first action, had B demanded judgment. It is certainly conceivable that a plea of estoppel or res judicata may be upheld under such circumstances.

Undoubtedly, the defendant is not *required* to urge his counterclaim in the plaintiff's action, under the Mississippi counterclaim statue. But if he uses the plaintiff's negligence in every material way except to ask for judgment against him, has he not actually taken advantage of his rights against the plaintiff? Is it right, then, in a later action, for the defendant to seek to recover on the same negligence which has been used defensively theretofore? The reasoning of *Cotton v. Walker* may well be extended to include such contentions, and the problem is one which should be given the utmost consideration.

Effect of Contributory or Comparative Negligence

Of the five states[96] having comparative negligence statutes, Mississippi has the only one permitting a recovery by the plaintiff, regardless of the degree of negligence;[97] although the plaintiff be fifty percent at fault, he has a right to recover fifty percent of his damages.[98] Conversely, the defendant has a corresponding right to recover fifty percent of his own damages from the former plaintiff. In each of the two actions, the defendant would plead affirmatively that the accident was caused by the negligence of the plaintiff, as well as his own. Each plaintiff would, of necessity, sue on the same allegations of negligence of the successive defendants, as would be set forth in defense of the claims of the respective plaintiffs.

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[96]Georgia, Mississippi, Nebraska, South Dakota and Wisconsin.

[97]Note, Ins. L.J. 667 (1951).

[98]Illinois Central R.R. v. Humphries, 174 Miss. 459, 164 So. 22 (1935); See Note, 102 A.L.R. 549 (1936).

Under the Mississippi counterclaim statute, all of these conflicting claims of negligence may be resolved in one action, thereby eliminating delay and expense. Yet, in cases where a counterclaim based on the negligence of the plaintiff could be presented but is not, it may be urged that the defendant is not entitled to an instruction on contributory or comparative negligence of the plaintiff. If the defendant affirmatively pleads the negligence of the plaintiff as a defense, but fails to interpose a counterclaim, it has been suggested that he would be estopped from doing so later.

Conclusions

In preparing this article, a number of problems have suggested themselves. They will, in turn, be suggested to the members of the Bar, without attempt to answer them.

Assume an action by an administrator for wrongful death of a decedent in an automobile accident, with a counterclaim by the defendant, charging negligence on the part of the decedent. Theoretically the defendant may recover over against the decedent's estate, or at least diminish the damages recoverable. To what extent does the diminution or recovery over change or modify the exemption of the wrongful death statute,[99] which provides that "damages . . . shall not be subject to the payment of the debts or liability of the deceased . . . "?

Assume an action against a defendant, in the county of his residence, in which he desires to interpose a counterclaim. What effect does the counterclaim statute have on the right of the plaintiff (as defendant in the counterclaim) to a change of venue "to the county of his household and residence"?[100]

Assume an action for recovery of money by a state, county or other governmental subdivision which is exempt from suit. Does the filing of the suit by the governmental subdivision constitute a "consent" for a counterclaim to be presented?

Assume an attachment at law, with the writ dissolved. Does the counterclaim statute broaden the statutory authorization[101] for awarding damages to the defendant for wrongful issuance of the attachment writ?

The Mississippi counterclaim statute has the worthy purpose of avoiding a multiplicity of suits, and, properly administered, it will eliminate much useless litigation. The lack of special verdicts and the requirements of written instructions will, to some extent, retard its general use. Its relation to other statutory procedures should be given con-

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[99]Miss. Code § 1453 (1942).
[100]Miss. Code § 1433 (1942).
[101]See Notes, 42 A.L.R. 1480 (1926) and 90 A.L.R. 431 (1934).

sideration, so that recommendations for eliminating certain inconsistencies may be presented to the legislature. Procedural reform should always be at the forefront of legal study, and this statute should fill a vital need in the administration of justice. Its study and use will ultimately resolve most of the questions discussed.

RECENT DECISIONS

CONSTITUTIONAL LAW—BASEBALL AND INTERSTATE COMMERCE

Toolson, a baseball player and member of the New York Yankee farm system, had refused to report to the Binghampton Club when his contract was assigned to that team by the Newark Club. As a result, he was placed on baseball's ineligible list and all teams in organized baseball were prohibited from employing him until he reported to Binghampton and removed himself from the list. Toolson charged organized baseball with being a monopoly in restraint of trade and sued for damages under the Sherman Antitrust Act.[1] HELD: Baseball is not subject to the Sherman Antitrust Act, and any change in its status must come from Congress. *Toolson v. New York Yankees, Inc.*, 74 S. Ct. 78 (1953).

This decision, while affirming the previous rule of *Federal Baseball Club of Baltimore v. National League*[2] did so only ". . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," and thus leaves the primary questions concerning baseball's connection with interstate commerce and its future connection with antitrust laws in other contexts still undecided. The decision, however, conforms to a previous trend[3] to let Congress declare its own power under interstate commerce and the antitrust laws. Since the *Federal Baseball* decision was reached under the theory that baseball was not interstate commerce, its affirmance, even in this limited sense, poses many questions as to its implications. The commerce power has been extended to cover subjects not originally considered commerce;[4] the word *trades* has been expanded to cover the occupation of doctors,[5] but in the instant case the Court refused to allow expansion without positive legislation from Congress on the matter. Factors propounded to the Court in attempting to apply the Act were the increase in revenue to clubs from television and radio contracts,[6] the complete monopoly of baseball,[7] and the restraint of trade on the use of baseball equipment.[8] The Court refused to consider these factors as sufficient to allow the change without positive legislation from Congress. A dissent by Mr. Justice Burton with whom Mr. Justice Reed concurred declared that the decision in effect announced that organized baseball was not interstate commerce. The dissent declared that baseball was commerce and as such was subject to the Sherman Act until expressly exempted by Congress. Accepting the arguments on the monopoly of baseball, the dissent considered as persuasive factors a House of Representatives' subcommittee report[9] labeling it as such, and

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[1]26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946), as amended, 50 STAT. 693 (1937).

[2]Federal Baseball Club of Baltimore v. National League, 259 U.S. 100 (1922). Here the Court ruled that baseball was not interstate commerce and the incidents of crossing state lines to play were not enough to change the character of the business and also delimited commerce so as not to include personal effort not relating to production.

[3]Wickard v. Filburn, 317 U.S. 111 (1942); Note, *Baseball and the Law—Yesterday and Today*, 32 VA. L. REV. 1164 (1946); and Dowling, *Constitutional Development in Five War Years*, 32 VA. L. REV. 461 (1946).

[4]*Compare* Paul v. Virginia, 8 Wall. 168 (U.S. 1869), *with* United States v. S.E. Underwriters' Association, 322 U.S. 533 (1943).

[5]American Medical Association v. United States, 317 U.S. 519 (1942).

[6]This income had come into being since the Federal Baseball case, *supra* note 2, at which time only a play-by-play telegraph announcement was being made and which factor was not considered by the Court.

[7]Baseball was early considered a monopoly by courts. See American League Baseball Club v. Chase, 86 Misc. 441, 149 N.Y.Supp. 6 (Sup. Ct. 1914).

[8]22 U.S.L. WEEK 3097 (U.S. Oct. 20, 1953).

[9]H.R. REP. No. 2002, 82nd Cong., 2nd Sess. 4, 7, and 111-139 (1952).

the effect of the reserve clause as part of the law of organized baseball.[10]

Both the majority and the dissenting opinions ignored the "reasonable restraint" test[11] discussed in the oral arguments[12] and the applicability of the act to services[13] of this nature. The decision ended a long period of controversy as to the weight still accorded the *Federal Baseball* case. A 1945 case[14] limited the *Federal Baseball* case to its facts, and a split decision in *Gardella v. Chandler*[15] remanded[16] a case to determine if the interstate character of baseball had been changed since the *Federal Baseball* case. The N.L.R.B., however, in 1946 refused jurisdiction in a labor dispute concerning the Pittsburgh baseball club,[17] relying on the *Federal Baseball* case. The decision, while protecting baseball for the present, nevertheless, leaves the primary question why baseball is exempt only upon the slender thread that Congress has shown no contrary intention. While the result may be popular, it is submitted that the uncertainty of reasons exempting baseball may subject baseball to future suits on other factual situations, with continued immunity by no means assured. For the present, at least, the case does protect America's most popular sport.

Irby Turner, Jr.

Constitutional Law—Distribution of Bibles In Public Schools Declared Unconstitutional

As a means of curbing the problem of juvenile delinquency, Gideons International[1] requested permission to distribute free Bibles to public school children on receipt of parental approval. Notwithstanding the objections of sectarianism or the preference of one religion over another, raised by Catholics and Jews as the use of the Gideon Bible is forbidden in those faiths, the school board decided in favor of the action since all distribution would be handled by the Gideons. A temporary injunction was obtained to prevent the distribution, whereupon the supreme court, on its own motion, intervened. Held: The attempted distribution of the Gideon Bible was in violation of the mandate of the First Amendment[2] of the United States Con-

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[10]Agreement of National Association of Professional Baseball Leagues, Major League Agreement, and the Major-Minor League Agreement. For a discussion of the law of baseball see Eckler, *Baseball—Sport or Commerce,* 17 U. of Chi. L. Rev. 56 (1949).

[11]Chicago Board of Trade v. United States, 246 U.S. 231 (1917).

[12]See note 8 *supra.*

[13]Federal Baseball Club of Baltimore v. National League, *supra* note 2. "Personal effort not related to production is not a subject of commerce." Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1941) declares that labor of a human being is not a commodity or article of commerce. See Eckler, *supra* note 10, at 68.

[14]Ring v. Spira, 148 F.2d 647 (2nd Cir. 1945). See Neville, *Baseball and the Anti-trust Laws,* 16 Ford. L. Rev. 208 (1947).

[15]172 F.2d 402 (2nd Cir. 1949). Judge Hand pointed out the significance of radio and television as factors to use in determining baseball's interstate character. He further added that should baseball as a result be declared interstate commerce, the Sherman Act would apply because a contract forbidding one from practicing his calling was a restraint of trade unlawful at common law. Judge Frank declared in Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1947) that the commerce power and the scope of the Sherman Act were discussed as if identical. Judge Chase dissented because of the control of the Federal Baseball case, *supra,* and because Apex Hosiery Co. v. Leader, 310 U.S. 469 (1937) declared that the Sherman Act applied only to restraints for the purpose of price fixing.

[16]The case was then settled out of court.

[17]*Baseball and the Law—Yesterday and Today, supra* note 3, at 1174.

[1]Gideons International Corporate Charter, § (c), states that the Gideons is a nonprofit corporation whose object is "to win men and women for the Lord Jesus Christ, through . . . distribution of the Bible for personal use."

[2]U. S. Const. Amend. I provides that "Congress shall make no law respecting an establishment of religion."

stitution, as incorporated into the Fourteenth Amendment[3] and of the New Jersey constitution.[4] *Tudor v. Board of Education*, 100 A.2d 857 (N. J. 1953).

The court traces the history of the struggle for the adoption of the separation of Church and State from 311 A.D.[5] to the present. This has been one of the most controversial issues of all constitutional law.[6] To determine just where the "wall of separation"[7] between Church and State should be erected the court must decide whether the state action *aids* religion[8] or merely *accommodates* religion.[9]

State action, through the use of public school release time programs[10] where religious instruction was permitted on the school premises, has been declared unconstitutional as an *aid* to religion.[11] Similar programs have been declared valid as merely *accommodating* religion[12] where religious instruction was available off the school premises and students were released from school to attend. The distinction has caused considerable controversy and many believe the *accommodation* theory overrules that of *aid*.[13]

To substantiate its holding the court cites with approval a case wherein the court declared constitutional the use of public school buses to carry Catholic students to and from a parochial school.[14] The court further cites with approval, but seemingly rejects, the case wherein the doctrine of *accommodation* of religion was established.[15] The court adheres to, but rejects as inapplicable, one of its *own* cases where compulsory reading of five verses of the Old Testament and permissive reading of the Lord's Prayer in public schools was declared constitutional.[16]

It is difficult to conceive why *less accommodation* or *aid* is given to religion by the transportation of pupils to a parochial school in public busses or the compulsory reading of the Bible in public schools than by the free distribution of Bibles in public schools to those children desiring them.

It is submitted that the court has erected the wall of separation between Church and State higher than is required under the First and Fourteenth Amendments to the

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[3]U. S. CONST. AMEND. XIV, §1 states that "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." Cantwell v. Connecticut, 310 U. S. 296 (1940).

[4]N. J. CONST. Art. I, Par. 4 requires that "There shall be no establishment of one religious sect in preference to another."

[5]2 SCHAFF, CHURCH HISTORY 78 (1882) cites the second *Edict of Milan* which ". . . established absolute freedom of worship."

[6]For complete historical background see dissenting opinion of Justice Rutledge in People *ex rel.* Everson v. Board of Education, 330 U. S. 1 (1942).

[7]JEFF. WORKS 113 (1854). Jefferson stated that the clause against establishment of religion was intended to erect a wall of separation between Church and State. This has become the by-line of the Supreme Court in the decisions on religious issues. Zorach v. Clausen, 343 U.S. 306 (1952); People *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948); People *ex rel.* Everson v. Board of Education, *supra* note 6.

[8]People *ex rel.* McCollum v. Board of Education, *supra* note 7.

[9]Zorach v. Clausen, *supra* note 7.

[10]This program is a program where students are released from school to attend religious functions either on the school premises or elsewhere. The program affects some two million students in 2200 communities. After the McCollum case, *supra* note 7, 11.8 per cent of the school systems relinquished their release times. See Note, *Release Time Reconsidered*, 61 YALE L. J. 405 (1952).

[11]People *ex rel.* McCollum v. Board of Education, *supra* note 7.

[12]Zorach v. Clausen, *supra* note 7.

[13]See dissenting opinions in Zorach v. Clausen, *supra* note 7.

[14]Everson v. Board of Education, *supra* note 6.

[15]Zorach v. Clausen, *supra* note 7.

[16]Doremus v. Board of Education of the Borough of Hawthorne, 5 N. J. 435 (1950), *appeal dismissed*, 342 U. S. 429 (1952).

Constitution. Rather than declaring the free distribution of Bibles invalid as an act of sectarianism, the action could have been permitted under the doctrine of *accommodation* of religion.

George D. Warner, Jr.

CONSTITUTIONAL LAW—PRIOR CENSORSHIP OF MOVIES, OUTLAWED OR NARROWED

This action is a joinder of two appellate suits, one from Ohio and the other from New York. Both involve the prior censorship of motion pictures by state censorship boards on grounds of immorality, the censors saying that the exhibition would be neither moral, educational, or of amusing and harmless character. HELD: Per Curiam reversal of the state courts. Prior censorship of motion pictures on the grounds of immorality is a violation of freedom of speech and press guarantees of the First Amendment. *Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship; Commercial Pictures Corporation v. Regents of University of State of New York,* 74 S. Ct. 286 (1954).

This decision reversed two detailed state court decisions. Both state decisions, one from Ohio and one from New York, specifically recognized that motion pictures come within the protection of the First Amendment and then upheld prior censorship in the individual cases at issue for the reason that such prior restraint was imposed because of immorality. The New York Court best expressed the rationale of the decisions in saying, "censorship of moving pictures which trangress the bounds of decency and sexual morality laid down by common consent is a valid exercise of the police power, and does not violate the rights of free speech and press guaranteed by the Constitution."[1] This New York decision upheld the restraint of exhibition of the French movie, *La Ronde*,[2] and the Ohio decision approved the censor's restraint of the showing of M.[3] Both of these films had been considered by the respective boards to be indecent, immoral, and harmful to the general populace. The respondents, in both cases, alleged that the censorship represented a violation of the guarantees of the First Amendment, was an unlawful delegation of legislative power and was issued under statutes which were vague and indefinite. The Ohio petitioner further contended that the censor's fee[4] was an unlawful and discriminatory tax. The Ohio and New York courts denied each of these contentions.[5] The United States Supreme Court's reversal of these decisions comes after a long but steady expansion of the guarantees of the First Amendment to include all modern media of communication.[6]

[1]Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 113 N.E.2d 502 (1953).

[2]This was a film depicting ten episodes of promiscuity, adultery, fornication and seduction, each dealing with an illicit amorous adventure between two persons, one of the two partners becoming the principal in the next, until the new partner in the last episode is the original woman in the first episode.

[3]This motion picture was banned because: (1) it involved cold blooded murders, (2) a schizophrenic killer was treated with sympathy, (3) an underworld boss was depicted as vastly more efficient than the police, and (4) methods for abducting children on the streets were elaborated.

[4]This was a fee charged each film company when their products were reviewed. It amounted to a charge of $3.00 per one thousand lineal feet. The court determined that this was a license voluntarily paid by the companies and that this caused an operation of estoppel.

[5]Superior Films Inc. v. Department of Education, Division of Film Censorship. State *ex rel.* Classic Pictures, Inc. v. Hissong. Classic Pictures, Inc. v. Department of Education, 159 Ohio St. 315, 112 N.E.2d 311 (1953). Commercial Pictures Corp v. Board of Regents of University of State of New York, supra note 1.

[6]*See* Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953); 39 A.B.A.J. 568 (1953).

The Court first specifically stated that such guarantees applied to motion pictures in 1948 in the case of *U.S. v. Paramount Pictures.*[7] This was reaffirmed and applied with force by the Court in 1952 in the famous *Burstyn* case,[8] better known as the "Miracle Decision."

The state courts in the subject case attempted to distinguish the *Burstyn* case[9] on the ground that it involved a motion picture which was banned because the censorship board found it to be "sacrilegious," while in the present cases both films were declared unlawful because they were immoral and they represented a threat to the moral health of the community.

The interesting aspect of this decision is whether it completely closes the door on all prior restraint of motion pictures or whether it simply invalidates the prior restraint on broad grounds of immoraiity. The per curiam reversal gives no indication of the reasoning of the majority of the Court, but the concurring opinion of Mr. Justice Douglas, with whom Mr. Justice Black agrees, seems to indicate that any prior restraint on any grounds would amount to a violation of the First Amendment.[10] In light of the fact that both state decisions upheld censorship on only the narrowest grounds,[11] it appears unlikely that the United States Supreme Court would uphold prior censorship of movies, except under very rare circumstances, as yet undefined. This would mean, of course, that the actions of state and municipal censorship boards are unlawful, and that a motion picture exhibitor would be free to exhibit any motion picture, but by doing so could subject himself to subsequent prosecution for creating a public nuisance or operating an enterprise which is a menace to the health and morals of the community.[12]

This decision, if it is a positive ban on prior censorship of motion pictures, represents a definite expansion of the First Amendment freedoms; but, as a practical matter, will not prevent state and local governments from acting against one who has exhibited an obscene or immoral motion picture. This seems entirely consistent with the modern concept of civil liberties.

Hunter M. Gholson

Constructive Trusts—Heir's Breach of Parol Promise to Hold Benefits for Another

Deceased had a policy of life insurance payable to each of his two children and a third payable to his estate. He desired that his second wife receive the benefits of the third policy, and so informed his children. Evidence was conflicting as to the nature and extent of the agreement between them. In reversing the lower court's decree for the widow, the court Held: '. . . to maintain her claim of constructive trust, . . . [she must] show by clear and convincing evidence . . . that her husband intended

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[7]334 U.S. 131 (1948).

[8]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), *reversing* 303 N.Y. 242, 101 N.E.2d 665 (1952).

[9]Joseph Burstyn, Inc. v. Wilson, supra note 8.

[10]Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship. Commercial Pictures Corporation v. Regents of University of State of New York, 74 S. Ct. 286 (1954).

[11]". . . although a motion picture film may not be rejected becaue of 'sacrilegious' expressions or portrayals, there still remains a limited field in which decency and morals may be protected from the impact of an offending motion picture film by prior restraint under proper criteria." Superior Films, Inc. v. Dept. of Eudcation etc., 159 Ohio St. 315, 318, 112 N.E. 2d 311, 318 (1953).

[12]*Cf.* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

for her to have the insurance, that his children . . . promised him to carry out such intention, that he relied upon them to do so." *Stovall v. Stovall,* 67 So.2d 391 (Miss. 1953).

The doctrine of constructive trust arose as a device for avoiding an unjust enrichment where one obtained legal title to property with no equitable right to its benefits.[1] Mississippi applied the doctrine to the instant type of case as early as 1890 when the supreme court held: "Intercepting a bounty intended for another and diverting it to one's self is held to be a fraud, from which a trust arises by operation of law. . . ." In the same case, however, the court limited the application of the doctrine to situations where there was conduct on the part of the defendant, "influential in producing, and but for which such result would not have occurred."[2] Fourteen years later the Mississippi court cited and relied on the *Ragsdale* case,[3] but refused to apply the doctrine, saying: ". . . not only must there be actual fraud on the part of the party sought to be held as trustee, but there must be clear and convincing proof of that fraud."[4]

In 1890 the requirement of actual fraud was expressly rejected when the Mississippi court again impressed a constructive trust and stated: "In order to come within this rule it is not necessary for a party actively to intervene. . . ."[5] Then the court quoted from a Maine decision: " . . . but [if] after the decease of the testator the devisee refuses to perform his agreement, equity will decree a trust, and convert the devisee into a trustee, whether when he gave his assent he intended a fraud or not; the final refusal having the effect of consummating the fraud."[6]

A more recent case[7] dealing with a constructive trust cited *Moore v. Crump*[8] for the proposition that the evidence supporting the trust must be "clear and convincing." But as the *Benbrook*[9] decision was subsequent to that of *Moore v. Crump,*[10] it would seem that at the time of the instant decision the plaintiff was required to show by this clear and convincing evidence only the agreement by the deceased and the defendant and the defendant's subsequent refusal to perform.

To the above, the majority in the instant case have added the requirement of reliance by the deceased on the defendant's performance of his promise. Though the dissent protests vigorously to the contrary, the inclusion of this requirement seems to be supported by the authorities.[11] However, if the court continues to apply this requirement in the manner in which it did in the instant case, it appears that the doctrine of constructive trust is all but lost as a device of restitution in Mississippi. The testimony quoted in the report is certainly strong enough to brand this as a harsh case. One wonders just what type of proof the plaintiff can present which will show

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[1]Restatement, Restitution § 160 (1937).
[2]Ragsdale v. Ragsdale, 68 Miss. 92, 8 So. 315, 316 (1890).
[3]*Ibid.*
[4]Moore v. Crump, 84 Miss. 612, 37 So. 109 (1904).
[5]Benbrook v. Yancey, 96 Miss. 536, 51 So. 461 (1910).
[6]Gilpatrick v. Glidden, 81 Me. 151, 16 Atl. 464 (1888).
[7]Coleman v. Kierbow, 212 Miss. 541, 54 So. 2d. 915 (1951).
[8]Moore v. Crump, *supra* note 4.
[9]Benbrook v. Yancey, *supra* note 5.
[10]Moore v. Crump, *supra* Note 4.
[11]Restatement, Restitution § 186 (2) (" . . . where a person dies intestate *relying* upon an agreement. . . ."); 3 Scott, Trusts § 491 (1939) (" . . . where A dies intestate *in reliance* upon a promise made by B. . ."); 65 C.J., Trusts § 222 ("Where . . . ancestor makes known to his heir his desire that his property shall be disposed of in a particular manner, and that *he relies* upon him. . ."); 54 Am.Jur., Trusts § 242 (". . . where an heir . . . violates a promise to the testator . . . *upon which the testator relied*. . ."); See Note, 66 A.L.R. 156 (1930). (emphasis supplied)

clearly and convincingly that the deceased went to his death relying on the defendant to carry out his promise. It is submitted that the establishment of the agreement and the fact that the deceased made no attempt to prevent the defendant from acquiring the title to the property is about all that a plaintiff can ever show in this type of case. This should be sufficient to establish the requirement of reliance.

James L. Young

Criminal Law—Clarification of Possession and Storage of Beer in a Dry County

Pursuant to the provisions of Miss. Code § 10208 (1942), Itawamba County determined by referendum that the transportation, *storage,* sale, distribution, receipt, and/or manufacture of beer with alcoholic content of less than four per centum was prohibited. Defendant was convicted under an indictment charging that he "did unlawfully have in his *possession* beer, for the unlawful purpose of sale in Itawamba County." (emphasis supplied) Held: *Storage* and *possession* of beer are not the same thing, and counties are not empowered to prohibit possession of beer with alcoholic content of less than four per centum. *Hoyle v. State,* 216 Miss. 330, 62 So.2d 380 (1953).

Since 1934 the statutes of Mississippi have been clear that no county or city can prohibit the possession of less than four per centum beer.[1] In decisions up to 1951 the Supreme Court of Mississippi implicitly stated that under the present statutes the possession of beer for personal consumption could in no way be disturbed.[2] In interpreting the statutes in 1951, however, the Mississippi Supreme Court declared, "The statute forbids storage, sale, distribution, *possession,* and receipt."[3] (emphasis supplied)

The main case removes the confusion that was occasioned by the statements in the 1951 decision. It is declared that the statutes conspicuously omit the word possession from local referendums which would prohibit the sale, transportation, storage, distribution, receipt, and/or manufacture of beer.

The instant case also distinguishes *possession* from *storage,* specifically defining storage as "the safekeeping of goods in a warehouse or other depository." It would seem that *storage* is applicable only to commercial warehousemen, *i.e.,* those who store goods of another for a price. This conclusion is strengthened by the fact that there is no apparent limit on the quantity of beer one can possess. It has been held that the keeping of twenty-two and a half cases of beer is within the classification of *possession* and, therefore, permissible.[4] And in the main case the holding of thirty-one quarts of beer was held not to be *storage.* The conclusion that storage is applicable only to commercial warehousemen is inevitable, for the word is generally accepted as expressing permanency and is not properly applied to merchandise on hand for immediate sale or disposition.[5] This position is given convincing support by the recent decision of *Walton v. State.*[6] In that case the defendant was keeping the beer of another in his icebox as an accommodation and not for a profit. The Supreme Court

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[1]Miss. Code § 10208 (19).

[2]State v. Sisk, 209 Miss. 174, 46 So.2d 191 (1950); Sparks v. Reddock, 196 Miss. 609, 19 So.2d 450 (1944); Moffett v. Attala County, 181 Miss. 419, 179 So. 352 (1938).

[3]Dubose v. State, 212 Miss. 521, 54 So.2d 756 (1951).

[4]State v. Sisk, *supra* note 2.

[5]Killian v. Brith Sholom Congregation, 154 S.W. 387 (Mo. 1941); Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070 (1940).

[6]68 So.2d 87 (Miss. 1953).

held that the keeping was not violative of the laws of a dry county.

The Mississippi Supreme Court had previously given a very broad construction to the word "distribution" contained in the statute.[7] The subject case shows that *storage* is not to be loosely construed, but will be restricted to its generally accepted meaning. It is evident that to enlarge the meaning of *storage*, the instant case would have to be overruled.

Maurice Dantin

MILITARY LAW—JURISDICTION OVER FORMER SERVICEMEN

Petitioner, a civilian, was arrested by military police at his place of employment in Pennsylvania on the charge of having committed murder while a member of the armed forces in Korea. He was transported to Korea for trial in a military court. A petition for a writ of habeas corpus against the Secretary of the Air Force, presented to the United States District Court for D.C., was sustained. This action is on return to the writ of habeas corpus. HELD: The Uniform Code of Military Justice has no provision for the arrest of a civilian since he is not under the authority of any commanding officer. Petitioner was discharged. *Toth v. Talbott,* 114 F. Supp. 468 (D.C. D.C. 1953).*

Under the Articles of War a civilian could not be tried in a military court for a crime which he committed while a member of the armed forces,[1] except in certain cases which involved fraud.[2] This resulted in a jurisdictional hiatus.[3] Congress attempted to fill this hiatus in Article 3 (a) of the UCMJ.[4] Petitioner in the instant case could not be brought before the civil courts of the United States for the trial of the alleged murder committed in Korea, for such courts would lack territorial jurisdiction.[5] The subject case also decides that Congress did not provide in the UCMJ for the arrest of a civilian. While it is provided that a civilian may be ordered into arrest by a commanding officer with authority over him,[6] it was shown that such provision is a *non sequitur* since a civilian has no commanding officer.[7] Consequently, the supposition of Article 3 (a) that a civilian may be returned to the military for the trial of a crime committed while a member thereof is vitiated by the instant case.

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[7]The delivery of three cans of beer by an employee of a roadside cafe prior to any payment therefor was held to be unlawful "distribution" of beer. See note 3 *supra*. However, it has recently been held that the delivery of the beer must be a *commercial* transfer of its possession, with the burden upon the State of showing beyond a reasonable doubt that the transfer was commercial. Walton v. State, 68 So.2d 87 (Miss. 1953).

*After this comment was submitted to the printer, the case was reversed by the United States Court of Appeals for the District of Columbia. 22 U.S.L. WEEK 2449 (1954).

[1]Hirschberg v. Cooke, 336 U.S. 210 (1949); *Ex parte* Wilson, 33 F.2d 214 (4th Cir. 1929); *In re* Lo Dolce, 106 F. Supp. 455 (D.C. N.Y. 1952); Wurfel, *Court-Martial Jurisdiction Under the Uniform Code,* 32 N.C.L. REV. 1 (1953).

[2]41 STAT. 805 (1920), 10 U.S.C. § 1566 (1946).

[3]In one instance a civilian who admitted killing his commanding officer while in the active service of the armed forces was allowed to go free. *In re* Lo Dolce, *supra* note 1.

[4]It was specified that a civilian would be subject to the jurisdiction of military courts for the commission of any crime, punishable by confinement of five years or more, while in the armed forces, provided such crimes could not be tried in the civil courts. 64 STAT. 109 (1950), 50 U.S.C. § 553a (Supp. 1950).

[5]62 STAT. 865 (1948), 18 U.S.C. § 7 (Supp. 1948); Wildenhus's Case, 120 U.S. 1 (1886).

[6]64 STAT. 111 (1950), 50 U.S.C. § 563c (Supp. 1950).

[7]It was declared that the military police in the instant case had no more authority to arrest a civilian than that possessed by a private citizen, which would require the bringing of the petitioner before the nearest available commissioner. FED. R. CRIM. P. 5. The alternative would be to hold that the provision referred to the commanding officer of the accused's unit at the time of the alleged commission of the crime.

In the cases where civilians were tried under military law prior to the UCMJ no question with regard to the manner of arrest arose, even though such law was silent as to the manner of arrest.[8] The United States Supreme Court, by denying certiorari, has upheld a lower court's decision that the subjecting of a civilian to court-martial for the commission of an act of fraud while in the armed services was not violative of the Fifth Amendment.[9] Consequently, it is submitted that Congressional enactment to implement Article 3 (a), by providing for method of arrest, would be held constitutional by the Supreme Court. However, the Sixth Amendment would probably require a different result with regard to the transportation of a person to a distant point for trial.[10] The reaching of the conclusion that legislation providing for method of arrest would be constitutional is expedited by the consideration that Article 3 (a) of the Uniform Code delimits itself to only those cases not amenable to civil jurisdiction.

The main case is an illustration that the civil judiciary jealously restrains unauthorized encroachments upon its guardianship of the civil Constitutional guarantees; it, nevertheless, soundly demonstrates that a jurisdictional vacuum still exists. It is evident that the ends of justice require legislation which supports the proposition of Article 3 (a) or broadens the scope of civil jurisdiction to encompass this type situation.

Maurice Dantin

MINES AND MINERALS—MEANING OF THE "MINERALS"

Grantor who reserved "all minerals now owned by me of every kind and nature, both liquid and solid," sought to enjoin grantees from conveying or otherwise disposing of gravel situated on the land. HELD: The term "minerals" when not specifically designated does not include sand or gravel. *Witherspoon v. Campbell*, 69 So.2d 384 (Miss. 1954).

This case illustrates the attitude of courts considering the problems which arise when a deed does not specifically set forth the understanding between the parties at the time of the transfer. The courts therefore have necessarily had to determine what "minerals" and "other minerals" mean. The word "mineral" is not a definite term, and its meaning must depend upon the intent with which it is used.[1]

The rule of construction followed by the courts is that the overt intent of the parties controls.[2] In order to produce an intention not openly manifested, the courts have considered the parties' relationships in business, the surrounding circumstances and the substance of the transaction evidenced by the language of the grant or reservation.[3]

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[8]Kronberg v. Hale, 180 F.2d 128 (9th Cir. 1950), *cert. denied*, 339 U.S. 969 (1950) (civilian's action against military officers for false arrest and imprisonment disallowed); U.S. *ex rel.* Marino v. Hildreth, 61 F. Supp. 667 (D.C. N.Y. 1945); Terry v. United States, 2 F. Supp. 962 (W.D. Wash. 1935).

[9]Kronberg v. Hale, *supra* note 8. The Supreme Court has also intimated that it is within the province of Congress to enlarge the field of crimes which would continue under military jurisdiction even after the individual had become a civilian. Hirschberg v. Cooke, *supra* note 1.

[10]The opinion emphasized that the Colonists listed the transportation of persons to distant points for trial as one of their grievances in the Declaration of Independence.

[1]Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931); Kinder v. LaSalle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923); Scott v. Laws, 185 Ky. 440, 215 S.W. 81 (1919); Barnard-Argue-Rathstearns Oil & Gas Co., Ltd., v. Farguharson, [1912] A.C. 864.

[2]Allen v. Boykin, 199 Miss. 417, 24 So.2d 748 (1946).

[3]See Note, 1 A.L.R.2d 787 (1945); 36 AM. JUR., MINES AND MINERALS § 31; 58 C. J. S., MINES AND MINERALS § 155.

It is well settled that a reservation of "minerals" includes oil and gas.[4] In regard to "solid minerals" it appears that "what the term includes differs as the facts of each case differ."[5] Many jurisdictions adhere to the theory that the removal of "minerals" such as sand and gravel through open pit mining would injure the surface, and therefore hold "solid minerals" to be excluded from a general reservation of "minerals".[6]

It should be noted that even where grantor and grantee know of commercial quantities of "solid minerals" at the time of the conveyance, these have been excluded unless specifically included within the instrument of conveyance.[7] The term "other minerals," "minerals," or "solid minerals" does not include bauxite,[8] natural gas,[9] or limestone.[10]

The subject case, in overruling *Moss v. Jourdan*,[11] presents an enlightening and logical determination of what the reservation "all minerals" should mean in this state. The great progress of oil development in Mississippi and in the United States places a burden upon the grantor under the Mississippi courts ruling that one should specifically allege the elements he wishes to exclude in conveying real property. It would seem that the phrase "other minerals" means little more than oil and gas; while the courts will still seek to gather an intention when not manifested it is apparent that they will not supply one in the case of "solid minerals."

Alvin Binder

TORTS—MALPRACTICE OF PHYSICIANS AND RES IPSA LOQUITUR

In 1946 the plaintiff underwent surgery, in which operation a needle was left in his stomach by the defendant surgeon. In 1950, the plaintiff became ill and then learned of the presence of the needle. Another operation ensued, and at a cost of $5,000 the needle was removed. Plaintiff brings this action for negligence. HELD: The doctrine of res ipsa loquitur makes out a prima facie case against the defendants, raising an inference of negligence. *Bowers v. Olch,* 260 P.2d 997 (Cal. 1953).

The operation of res ipsa loquitur has long been vexatious in the law of torts. However, certain conditions are generally recognized as prerequisites for invoking the rule. These requirements are: (1) The accident must be one of a nature which does not ordinarily occur in the absence of someone's negligence. (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.[1] These requirements have been adopted in Mississippi.[2]

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[4]Shell Oil Co. v. Dye, 135 F.2d 365 (7th Cir. 1943); U.S. Lovelace v. Southwestern Petroleum Co., 267 F. 513 (6th Cir. 1920).

[5]Beury v. Shelton, 151 Va. 28, 144 S.E. 629 (1928).

[6]Waring v. Foden, 1932 1 Ch. 276 (C.A.); See Notes, 1 A.L.R.2d 787 (1948) and 86 A.L.R. 969 (1932).

[7]Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So.2d 228 (1942); State *ex rel.* Land Office Commissioners v. Hendrix, 196 Okla. 596, 167 P.2d 43 (1946); Beck v. Harvey, 196 Okla. 270, 164 P.2d 399 (1944); Winsett v. Watson, 206 S.W.2d 656 (Tex. 1947); Psencik v. Wessels, 205 S.W.2d 658 (Tex. 1947).

[8]Carson v. Mo. R.R., 209 S.W.2d 97 (Ark. 1948).

[9]Bundy v. Meyers, 372 Pa. 583, 94 A.2d 724 (1953).

[10]Eldridge v. Edmondson, 252 S.W.2d 605 (Tex. 1952).

[11]129 Miss. 598, 92 So. 689 (1922).

[1]Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944).

[2]Palmer v. Clarksdale Hospital, 213 Miss. 601, 57 So.2d 473 (1949); Waddle v. Sutherland, 156 Miss. 540, 126 So. 201 (1930).

The chief problem in the application of res ipsa loquitur is whether it operates as an inference of negligence or as a presumption of negligence. The operational effect of these two theories was pointed out in the case of *Wright v. Valan*,[3] where it was held that a presumption of negligence, without evidence to rebut it, will entitle the plaintiff to a directed verdict, leaving only the question of damages to the jury. An inference of negligence requires that both the question of negligence and of damages be presented to the jury. The West Virginia court concluded that the inference of negligence rule was followed in that state. This appears to be the better view and is applied by the federal courts.[4] Practically, a presumption of negligence would require the defendant to rebut the evidence or suffer a directed verdict. Conversely, an inference of negligence would leave the question to the jury, in which case they may or may not find negligence.[5]

The majority view was clearly expressed by the New York Court of Appeals:[6] "Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."[7]

An early twentieth century case in Mississippi appears to be closer to the presumption of negligence rule. While not mentioning the res ipsa loquitur doctrine, the court held that the unexplained leaving of a four-inch rubber tube in the patient's body by a physician *is* (emphasis added) negligence.[8]

The position of Mississippi was further confused by the case of *Waddle v. Sutherland*.[9] Mr. Justice Anderson in one part of that opinion adopted the language of Mr. Justice Pitney in the *Sweeney*[10] case and held: "Res ipsa loquitur means that the facts of the occurrence warrant the *inference* (emphasis added) of negligence, . . . that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking."[11] In a subsequent paragraph the court held that "if the evidence showed that state of facts, then there followed the prima facie *presumption* (emphasis added) that the appellant's injury was caused by the negligence of appellee. . . ."[12] The confusion of terms in the *Waddle* case was clarified in the later case of *Sanders v. Smith*,[13] in which the majority view of negligence was adopted.

In 1949, the Supreme Court of Mississippi crystalized res ipsa loquitur law in this state by holding that an inference of negligence and a presumption of negligence were, in effect, the same, but the court adopted the definition of inference of

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[3]130 W.Va. 466, 43 S.E.2d 346 (1947).

[4]Jesionowski v. Boston & M.R.R., 329 U.S. 452 (1947); Sweeney v. Erving, 228 U.S. 233 (1913); Rocona v. Guy F. Atkinson Co., 173 F.2d 661 (9th Cir. 1949).

[5]PROSSER, TORTS 303 (1941).

[6]George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

[7]This language was adopted verbatim by the Mississippi Supreme Court in Waddle v. Sutherland, *supra* note 2.

[8]Saucier v. Ross, 112 Miss. 306, 73 So. 49 (1916).

[9]156 Miss. 540, 126 So. 201 (1930).

[10]Sweeney v. Erving, *supra* note 4.

[11]Waddle v. Sutherland, *supra* note 2.

[12]*Ibid.*

[13]200 Miss. 551, 27 So.2d 889 (1946).

negligence as correct.[14] This clearly showed Mississippi to support the majority view in theory, though misusing the terms.

Thus, Mississippi and the subject case hold the doctrine to be a simple rule of circumstantial evidence. In its correct application res ipsa loquitur does not require the defendant to rebut the evidence, but merely creates a prima facie case for the plaintiff when the three requirements of the *Ybarra*[15] case are met, from which a jury may or may not infer negligence.

W. Marion Smith

WITNESSES—SELF-INCRIMINATION—WAIVER OF PRIVILEGE

Under subpoena, defendant voluntarily answered certain questions propounded to her in federal grand jury proceedings, but in the subsequent trial of the case, she refused to make similar testimony on the grounds that the testimony might tend to incriminate her. HELD: Previous waiver of privilege against self-incrimination in grand jury proceedings does not amount to a waiver of such privilege in the ensuing trial. *In re Neff*, 206 F.2d 149 (3rd Cir. 1953).

"No person . . . shall be compelled in any criminal case to be a witness against himself."[1] This guarantee under the Bill of Rights is given a broad interpretation in favor of the right it is designed to protect, *i.e.*, any self-incrimination.[2] The privilege of refraining from self-incrimination is, nevertheless, a personal one and may be waived by the witness at any time.[3] It is generally recognized that the privilege may be waived by the witness in any one of four ways: (1) By a voluntary and specific verbal or oral statement;[4] (2) By a failure to assert the privilege unequivocally;[5] (3) By a voluntary admission of a criminating fact;[6] and (4) By a taking of the witness stand by the defendant in his own behalf.[7]

As well established as the rule of waiver seems to be in this country, it has never been accepted in England, where it has been held, in effect, that the privilege cannot be waived, but may be invoked in substantially all cases at any point in the proceedings.[8] This strict rule has never been favored in the United States except in one or two jurisdictions.[9] But even in this country waiver is not lightly to be presumed,[10] even in those cases where it is recognized to exist.

In deciding the instant case, the court relied on the proposition that a grand jury is appendent to the federal court machinery only insofar as it brings the case to trial and determines the sufficiency of the evidence.[11] This was a new question for a fed-

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[14]Palmer v. Clarksdale Hospital, 206 Miss. 680, 40 So.2d 582 (1949).

[15]Ybarra v. Spangard, *supra* note 1.

[1]U.S. CONST. AMEND. V. Forty-six states have similar constitutional provisions, and Iowa and New Jersey have statutes which accomplish the same result.

[2]Counselman v. Hitchcock, 142 U.S. 547 (1891).

[3]Rogers v. United States, 340 U.S. 367 (1951).

[4]United States v. Steffen, 103 F.Supp. 415 (N.D. Cal. 1951).

[5]Claiborne v. United States, 77 F.2d 682 (8th Cir. 1935).

[6]Rogers v. United States, *supra* note 3. Once there has been some degree of disclosure, a person can be forced to give further evidence that may help convict him. The waiver is accomplished by the admission of the criminating fact and does not depend upon any further waiver.

[7]Viereck v. United States, 139 F.2d 847 (11th Cir. 1944).

[8]Regina v. Garbett, 2 Car & K. 474 (N.P. 1847); 8 WIGMORE, EVIDENCE, § 2276 (3rd ed. 1940).

[9]8 WIGMORE, EVIDENCE, § 2276 (3rd ed. 1940).

[10]Poretto v. United States, 179 F.2d 392 (5th Cir. 1952).

[11]*Application of* United Electrical, Radio, and Machine Workers of America, 111 F. Supp. 858 (S.D. N.Y. 1953).

eral appellate court,[12] even though the rule was established that the privilege is not waived by testifying in *any prior independent* proceeding.[13] If this were not the case, the witness might subject himself to a new cross-examination and be required, under new and changed conditions to give testimony that he might not have anticipated or intended in subjecting himself to examination as a witness in a prior and different proceeding.[14]

Statements made to an F.B.I. agent,[15] an immigration official,[16] or court in a primary hearing without a jury[17] have likewise been held not to amount to a waiver of the privilege. However, testimony before a coroner's jury[18] or a fire marshall [19] are held to be waivers of the privilege in the later trials for murder and arson respectively. In like manner, a waiver is accomplished after producing incriminating or partially incriminating papers or documents.[20]

It appears that the result in the case under consideration is not new to the law of evidence in state courts nor is it basically new in the federal courts. Yet, it stands for a further clarification of the extent of a constitutional privilege—a privilege, the use of which is sometimes condemned by the very citizenry it was designed to protect on the pretext that in a particular case the ends justify the means.

Charles K. Pringle

Workmen's Compensation—Sufficiency of Evidence on Appeal

A woman fifty years of age had suffered from high blood pressure for several years. She was stricken with a "massive cerebrovascular accident," explained by physicians as a rupture of a blood vessel of the brain, while employed to pick up tung-nuts which had fallen from trees. Doctors testified that such work was dangerous for persons suffering from such an ailment; that death could result while walking, sleeping, or doing light household duties; also that deceased's lunch could possibly have caused death. Attorney-referee, Workmen's Compensation Commission, and Circuit Court denied compensation to claimants. Held: There was not such substantial conflict in the testimony as to afford a reasonable basis for denial of the claim by the triers of fact. *Cowart v. Pearl River Tung Co.*, 67 So.2d 356 (Miss. 1953).

Mississippi, being the last state to adopt a Workmen's Compensation Law,[1] is, and has been in a position to benefit from the host of decisions in workmen's compensation cases of other states; therefore, it would seem that this state would follow the almost universal rule in workmen's compensation appeal cases, viz: The appellate court will not disturb the decision of the Commission if such finding is supported by substantial evidence.[2] This substantial evidence test was used by the Mississippi Supreme Court in rendering a decision on an appeal from the findings of the Public Service Commis-

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[12]However, a like result was reached under similar factual situation in United States v. Malone, 111 F. Supp. 37 (N.D. Cal. 1953) and in all state appellate courts confronted with the question. *In re* Neff, 206 F.2d 149, 152 (3rd Cir. 1953).

[13]United States v. Steffen, *supra* note 4.

[14]People v. Cassidy, 213 N.Y. 338, 107 N.E. 713 (1915).

[15]Marcello v. United States; 196 F.2d 437 (5th Cir. 1952).

[16]United States v. DePietro, 36 F. Supp. 389 (W.D. N.Y. 1941).

[17]Hutchins v. State, 212 Miss. 145, 54 So.2d 210 (1951).

[18]Felden v. State, 108 Miss. 580, 67 So. 56 (1915).

[19]Ogle v. State, 193 Ind. 187, 127 N.E. 547 (1920).

[20]Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949).

[1]Miss. Code § 6998-01 *et seq.* (1942).

[2]Cole v. Miami, 52 Ariz. 488, 83 P.2d 997 (1938); McGregor & Pickett v. Arrington, 206 Ark. 921, 175 S.W.2d 210 (1943); Vega Aircraft v. Industrial Acc. Comm., 27 Cal.2d 529, 165 P.2d 665 (1946).

sion.[3] The application of the substantial evidence test was broadened on an appeal from the Oil and Gas Board, the court stating that one test on appeal would be whether the decision was supported by substantial evidence.[4]

The foundation appeared to be firmly established as to the province of the Supreme Court in reviewing decisions rendered by administrative boards and commissions of this state. However, in the case of *Lucedale Veneer Co. v. Rogers*,[5] the Supreme Court evidently took a different view of its judicial function by basing its decision upon issues of fact, three justices dissenting. Justice Alexander pointed out in his dissent that the Supreme Court "by reviewing the conflicting testimony, has in effect, tried the case de novo. We are without power so to do." Only when the Commission arbitrarily or capriciously acts in the absence of supporting evidence does a question of law arise on appeal.[6]

Substantial weight should be given to the findings of the Commission.[7] It is not for the court to search for a prejudicial error; the Commission is in a more advantageous position to weigh the credibility of witnesses' testimony and to determine the weight of evidence presented.[8] If the conclusions reached by the Commission are sustained by substantial evidence, the triers of fact should not be denied the right to accept and act upon such evidence.[9] There is no authority for the Supreme Court to reverse if the facts are supported with substantial evidence.[10] Only where such findings of fact and conclusions are manifestly wrong or contrary to the overwhelming weight of evidence should the decision be reversed.[11]

The function of the Supreme Court as an appellate court is to review questions of law,[12] not to become "pro hac vice the Workmen's Compensation Commission," where the issues of fact remain open for re-examination.[13]

Joseph Eugene Boone

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[3]Dixie Greyhound Lines, Inc. v. Miss. Public Service Comm., 190 Miss. 704, 200 So. 579 (1941).

[4]California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946), where the court laid down four tests: "whether or not the same is reasonable and proper according to the facts disclosed before the Board . . . its decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the Board to make, or whether it violates any constitutional right . . ."

[5]211 Miss. 613, 53 So.2d 69 (1951).

[6]Meridian v. Davidson, 211 Miss. 683, 53 So.2d 48 (1951).

[7]Dodd, *Administration of Workmen's Compensation*, 20 Miss. L. J. 168, 170 (1949).

[8]Dodd, *supra* note 7, at 171.

[9]Thornton v. Magnolia Textiles, 55 So.2d 172 (Miss. 1951); Brown Buick Co. v. Smith's Estate, 52 So.2d 664 (Miss. 1951); Barry v. Sanders Co., 211 Miss 656, 52 So.2d 493 (1951).

[10]Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So.2d 381 (1951).

[11]Sones v. Southern Lumber Co., 215 Miss. 148, 60 So.2d 582 (1951).

[12]Lucedale Veneer Co. v. Rogers, 211 Miss. 613, 53 So.2d 69, 79 (1951) (Dissent).

[13]*Id.* at 78.

RECENT BOOKS

LAW AND THE FARMER. By Jacob H. Beuscher. New York, Springer Publishing Company, Incorporated, 1953. Pp. 406. $4.95.

Law and the Farmer is one of the Springer agricultural series, the other being *Livestock Health Encyclopedia*. These two titles are indicative of the obvious tenor of the volumes: *Law and the Farmer* is directed to farmers.

Jacob H. Beuscher, Professor of Law at the University of Wisconsin, sets about very capably and methodically to outline various legal concepts in lay terms and to explain them in an understandable manner. He first introduces the farmer to law, legislative and common, and then to its making and administration in the legislatures, courts, and other agencies. Part two details the over-the-table procedure of buying or selling a farm, in such terms as ownership, title, fundamental requirements of deeds, and ordinary provisions of leases. Part three might be termed, prosaically enough, an agricultural estate planning handbook, wherein father-son-family working agreements are developed and traced through the death of either party, including a smattering of the probate procedure and death tax pitfalls. The final portion is a daily guide for the operation of the farm from a legal standpoint, describing tax bases, state and federal agricultural control, farm creditors and debtors, and a farmer's standard of care in all operations and animal keeping, and finally touching upon the eternal bones of contention of boundary and fence rights.

Upon first glance a reader may suspect that the book would be so written from a Wisconsin point of view as to be inapplicable to other areas. However, this is not the case, for enough examples of agricultural-legal processes are given to be apropos to any state, and care is always taken to point out local variations.

Who would be interested in the book? Likely, the farmer to whom it is directed will be discouraged from attempting to delve into the legal realm, giving way to the customary notion that law can only be fathomed by the lawyer. For any farmer who could be cajoled into studying through its readable pages, with questions and answers, the volume offers the reward, for what it may be worth, of dispelling this unfortunate hokus-pokus fallacy. Thus, if it should serve no other purpose, the book should promote a better understanding on the part of the farmer-client of the problems that confront a lawyer as he tries to protect the interests of everyone involved in what seems to be a very ordinary business transaction. In the field of legal public relations, then, it may be said that *Law and the Farmer* is a helpful adjunct.

Obviously, education and not public relations is the prime objective of Professor Beuscher; sadly enough, resistance to education runs rather high at present, as perhaps it always has.

To the practicing lawyer, the volume is probably old hat; to the legal neophyte, somewhat more educating in the hackneyed "practical" sense; and to the farmer, extremely helpful day to day and in long range planning. In conclusion, the efforts of Professor Beuscher are admirably directed into a helpful treatise, but which helpful treatise, unfortunately like "good" advice, seems likely to be seldom taken.

John White Valentine

BOOKS RECEIVED

Administrative Law. By Louis L. Jaffe. New York: Prentice-Hall, Incorporated, 1953. Pp. 647. $10.00.

Cogitations on Torts. By Warren A. Seavey. Lincoln, Nebraska: University of Nebraska Press, 1954. Pp. 72. $2.00.

A Concise History of the Law of Nations. By Arthur Nussbaum. New York: The MacMillan Company, 1954. Pp. 376. $5.00.

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Guide to Pension and Profit Sharing Plans. By Robert S. Holzman. Mount Vernon, New York: Farnsworth Publishing Company, 1953. Pp. 64. $1.50.

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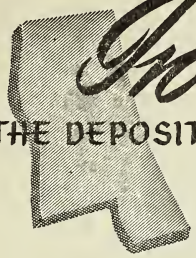

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